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THE LAW OF DRUGS AND DRUGGISTS

A TREATISE WITH TEXT, CASES, STATUTES,
READINGS AND DIGESTS FOR SCHOOLS OF
PHARMACY, RETAIL, WHOLESALE,
AND MANUFACTURING DRUGGISTS

BY
WILLIAM R. ARTHUR
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SECOND EDITION

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To My Friend
Col. Homer C. Washburn
Dean of the School of Pharmacy
University of Colorado, Boulder, Colorado

PREFACE TO SECOND EDITION

During the five years that have elapsed since the first edition was published, the new Federal Food, Drug, and Cosmetic Law has been passed, the Federal Narcotic Laws have been reclassified and placed in the Internal Revenue Code of 1939, and important cases have been decided. These changes have made necessary a complete revision of Part II which comprises Federal Statutes and Regulations.

In addition to these changes it is deemed expedient to include the Marihuana Act in Appendix 2.

I am indebted to Mr. Edward J. Carroll, Promotion Manager of Davis Bros. Drug Co., Denver, Colorado, for helpful suggestions as to the operation of the Federal Statutes named above; to Prof. Charles F. Poe, State Chemist, for information on the Food, Drug, and Cosmetic Act; to Dean Homer C. Washburn and Prof. David W. O'Day, of the School of Pharmacy, of the University of Colorado, for much helpful criticism; to Mr. R. C. Gasen, special lecturer on Pharmacy Law, University of Colorado, 1939-1940, for suggestions concerning the operation of the Narcotic Act; to William Federici for verifying citations; and to Winifred B. Arthur, without whose help this work would not have been completed.

W. R. A.

UNIVERSITY OF COLORADO

March 1, 1940

PREFACE TO FIRST EDITION

This volume was commenced many years ago by Dean Washburn and the writer, but, owing to heavy school duties, the Dean was soon compelled to discontinue his part of the work, though not before he had contributed many valuable suggestions concerning the plan and general make-up of the book.

For several years we had been giving a short course on drug law to the senior classes of the School of Pharmacy of the University of Colorado, from mimeographed cases, which material proved unsatisfactory, and so a text was undertaken better to serve the purpose.

In this text an effort has been made to present as many fact situations as possible in which danger lurks and out of which litigation arises, that the druggist, in the performance of his professional duties, may readily recognize situations which present special hazards.

W. R. A.

UNIVERSITY OF COLORADO
BOULDER, COLORADO
January, 1935

FOREWORD

This volume on drug law has been written in the hope of meeting the needs of students in schools of pharmacy as well as of wholesale and retail druggists and of drug manufacturers generally for a ready reference work covering the law of the drug industry. Though many other branches of the law have been arranged and grouped according to subjects, heretofore there has been no complete classification of the law of drugs and druggists.

It has been necessary to collect the material for this volume from many sources—United States statutes, United States reports, state constitutions, state statutes, state reports, English reports, the common law, city ordinances, text-books, legal journals, and the regulations of state boards of pharmacy.

Every person in the United States, living outside the District of Columbia, has his conduct regulated by two constitutions, the Constitution of the United States and the constitution of the state in which he lives. A federal and state system of laws prescribes rules of conduct which he must observe, and, in addition, there are also ordinances of city, town, or village. Then there exists, in most of our states, what is known as the common law, a system of principles and rules enunciated by the courts in conformity with immemorial custom and usage. A large volume of administrative law has also grown up in this country based on decisions of administrative bodies like the Food and Drug Administration, the Federal Trade Commission, and many others.

There are statutes, ordinances, administrative rules, and thousands of court decisions affecting the drug business. An effort has been made to include all the relevant federal statutes in this book. It would be impossible to include all the drug statutes of the different states in a brief volume like this, but many leading statutes are referred to, and where possible, the trend of recent state law is indicated.

It would be of great advantage to the drug industry to have a uniform state drug law but until such uniformity is attained druggists are advised to keep themselves informed upon the drug laws of their own states. In some states these can be had in pamphlet form by applying to the state board of pharmacy or the secretary of state.

A number of leading court decisions affecting the drug industry are given in this book. In the interest of conciseness and simplicity, the writer has restated the facts instead of inserting the often long and complicated statement of facts contained in the decisions. But, since the law is to be found in the opinions and definitions, these have been reproduced in the exact words of the judges. Thus there is a statement of what the law really is rather than what some commentator thinks or says about it. Many other cases are made available through excerpts and brief digests, and by reference to readings, extensive annotations, and texts.

Recently a number of books, pamphlets, and magazine articles have appeared exposing the dangers and injuries that often accompany the indiscriminate use of various preparations commonly sold in drug stores and other general dispensaries. These findings in many cases show, or purport to show, that a large number of widely advertised preparations are dangerous or injurious, or at least utterly useless for the purpose for which they are sold. These numerous publications at the present time are attracting much attention, and, in conjunction with pending legislation, both state and national, tend to awaken widespread interest in the subject to which this book is devoted. Doubtless, as a result of these publications, increased litigation will follow the awakened public interest and more general dissemination of knowledge of the subject.

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GLOSSARY

- Abet**—To aid or encourage another.
- Acceptor**—One who accepts a bill of exchange.
- Accessory**—One who aids subordinatedly in the commission of a crime but is not present at the time of its commission.
- Adjudicate**—To determine judicially.
- Administrator**—A person appointed by court to take charge and administer the estate of one deceased.
- Administratrix**—A woman appointed by the court to take charge and administer the estate of one deceased.
- Affidavit**—A statement signed and sworn to before an authorized officer.
- Agent**—One who acts for another.
- Allegation**—The assertion of a party to a suit of the facts he intends to prove.
- Anti-trust**—Opposed to, or contrary to such combinations for monopolies or unlawful restraints.
- Appellant**—One who appeals a case to a higher court.
- Appellate Court**—A court having jurisdiction of cases brought from a lower court for review.
- Appellee**—One against whom an appeal is taken.
- Apothecary**—One who compounds drugs, fills prescriptions, and has drugs for sale.
- Appurtenances**—Things incident to, or accessory to another thing.
- Assault**—An attempt to do injury to another by force.
- Assess**—To determine the amount of payment due.
- Assignee**—The person to whom an assignment is made.
- Assignment**—A transfer of all the interest one has in real or personal property, and used commonly in relation to leases for years.
- Assignor**—The person who makes an assignment.
- Averment**—A positive statement of facts in pleadings, not of things argumentative or inferential.
- Battery**—Striking or beating another with violence.
- Bearer**—One who holds negotiable paper not payable to a designated person.
- Blacklisting**—Rating a designated person as unworthy of credit.

Blank Indorsements—An indorsement which does not designate the indorsee.

Bona Fide—In good faith.

Caveat Emptor—The buyer must beware, meaning that the purchaser of an article must examine, judge and determine the qualities of it.

Chattel—Personal property.

Chattel Mortgage—A mortgage on personal property.

Citation—(a) A summons to a person to appear, (b) The figures and letters which indicate where a legal authority may be found.

Civil Action—An action to enforce and protect a private right, or to prevent or redress a private wrong.

Code—An authorized collection of laws, purporting to be all the laws on the particular subject or subjects.

Co-employee—A fellow-worker.

Commercial Paper—Negotiable instruments.

Compensatory—In relation to damages, a suitable return for injury or loss suffered.

Consignee—The person to whom goods are consigned.

Consignor—The person sending goods on consignment.

Constitutional—Not conflicting with the constitution or other fundamental law of the state.

Contract—An agreement, properly entered into, upon a lawful consideration. See Black's L. Dic.

Contributory Negligence—Such negligence of the plaintiff in concurrence with the negligence of the defendant as contributes to the injury of the plaintiff.

Co-partnership—See Partnership.

Copyright—Particular rights in literary productions granted by the government to the producer.

Corporation—An artificial person, created by law, for some particular purpose, having power of succession, and particular powers and duties existing by virtue of its charter.

Covenant—A promise under seal, usually a clause in a deed or lease.

Covenantor—One who makes a binding promise under seal.

Damages—Compensation for loss or injury suffered.

Decision—In law, the judgment of a court.

Defamatory—Slandorous or libelous.

Defendant—A person who is sued.

Defense—The plea or answer of the defendant stating reasons why plaintiff should not recover.

- Demurrer**—An allegation admitting the facts pleaded by the opponent, but declaring that such facts do not constitute a cause of action and that the court should compel no further plea or answer on the part of the one demurring.
- Dictum**—A statement made by a judge in deciding a case, not essential to the determination of the case.
- Easement**—A right enjoyed by one person over the land of another; as a right of way.
- Entrapment**—An ensnaring by means of trick or artifice.
- Estate**—(a) The property a man owns. (b) The nature of a man's interest in realty.
- Evidence**—Facts offered in court to prove or disprove a point of controversy.
- Execute**—To carry out a will, to do the acts necessary to make it valid.
- Exemplary**—Damages over and above compensation.
- Ex Parte**—From one side only.
- Ex Rel.**—Ex relatione. A legal proceeding instigated by an officer, in the name of the state, on the information of an individual who is interested in the outcome.
- Fac Simile**—An exact copy or reproduction.
- False Arrest**—Unlawful restraint of a person.
- Felony**—A grave offense, punishable usually by death or imprisonment in a state prison.
- Foreclosure**—"A proceeding in chancery by which the mortgagor's right of redemption is barred." Bouvier's L. D.
- Forfeit**—To lose property or a right as a penalty.
- Gravamen**—The substantial cause of the controversy.
- Immunity**—Freedom or exemption from.
- In Camera**—A hearing before the court when spectators are not admitted.
- Incumbrance**—A claim attaching to land, as a mortgage.
- Indictment**—A written accusation of a person of a crime, found by a grand jury under oath, and presented to the court.
- Indorsee**—The one to whom negotiable paper is indorsed.
- Indorser**—One who indorses a negotiable instrument.
- Injunction**—A writ which prohibits or commands an act.
- Innocent Purchaser**—One who purchases in good faith for value, without knowledge or means of knowledge of any defect in title in the thing purchased.
- In Re**—In the matter.
- Insolvency**—Inability to pay debts when due.
- Intestate**—When the deceased left no will.

Judicial—Having some relation to the administration of justice, and is usually used in connection with some other word limiting its application as, judicial authority, judicial confession, etc.

Judicial Notice—The act of a court in taking notice of facts without the necessity of producing evidence.

Jurisdiction—The territory and subject-matter over which a court has authority to try and determine causes.

Jury—A number of laymen chosen to determine, under the direction of the judge, the truth of facts in a case.

Lessee—A person who takes a lease as a tenant.

Lessor—A landlord who grants a lease.

Libel—"A false and malicious defamation of another, expressed in print or writing or pictures or signs, tending to injure the reputation of another, and exposing him to public hatred, contempt or ridicule." Black's L. Dic.

Libel (in admiralty)—To seize under admiralty process at the beginning of a suit.

License—Legal authority to perform certain acts which otherwise could not lawfully be done.

Lien—The right to retain property until some charge against it is satisfied.

Litigation—Carrying on a suit in court.

Mandamus—An order from a court to a person, corporation, or inferior court, to do or perform some duty or act of office.

Misdemeanor—Any crime which is less than a felony.

Mitigation—"Abatement or diminution of a penalty or punishment imposed by law." Black's L. Dic.

Mortgage—A contract by which the owner of property makes it security for the payment of a debt, without divesting himself of the possession of it.

Municipal—Relating to a town or city.

Negligence—Carelessness in performing an act or failure to perform an act which one should perform.

Negotiable—Capable of being transferred by indorsement and delivery.

Nominal Damages—A mere trifling sum awarded by the jury when the plaintiff has a cause of action but has suffered no substantial damage.

Non Sequitur—It does not follow.

Non Sul Juris—Not in his own right.

Nonsuit—A judgment entered against a plaintiff for failure to prosecute or prove his cause.

Ordinance—An enactment of a city or town for purposes of government.

Partnership—A combination of the time, labor, skill and capital, or part of them, by two or more persons, for the transaction of business.

Penalty—Punishment for a crime or offense.

Per Curiam—By the court.

Perjury—Intentionally giving false testimony on a material fact in a judicial proceeding.

Per Se—Of itself.

Plaintiff—One who brings a lawsuit.

Prima Facie—At first appearance.

Process—In relation to an action, it means the method used to compel the defendant to appear in court.

Promisee—The person to whom a promise is made.

Promisor—The person who makes a promise.

Proprietary—Having a property right therein.

Prosecution—A criminal action.

Proviso—A clause of condition or exception inserted in an obligation, stating the legal duties or rights on performance or non-performance of certain acts by one or more of the parties.

Proximate—Direct or immediate.

Punitive Damages—A sum over and above the loss suffered, awarded by way of punishment.

Reciprocate—To interchange.

Release—Relinquishment of a right or claim.

Replevin—A writ to obtain possession of personal property wrongfully withheld.

Res Ipsa Loquitur—The thing itself speaks. Applied in negligence cases to mean that no proof of negligence is necessary, that proof of the act is proof of the negligence.

Respondeat Superior—The master is liable for certain acts or wrongs of his servant.

Respondent—In law the person who opposes the appeal, and in equity the one who makes the answer.

Search Warrant—Written authority to an officer to search a particular place for articles supposed to be unlawfully concealed there.

Slander—The speaking of defamatory words which cause injury to the reputation of another.

Statute—An enactment by a legislative body.

Subornation—Procuring another person to commit a crime.

Subpoena—A process to bring a witness into court to testify.

Suit—An action in court.

Surety—One person binding himself for the obligation of another, who is already bound.

Testator—A person who dies leaving a will.

Testimony—Statements of witnesses while on the witness stand.

Tort—Violation of the rights of another, not arising out of contract, as assault and battery.

Tort Feasor—One who is guilty of committing a tort.

To Wit—Namely.

Trade-mark—A symbol, mark, or device used to distinguish goods.

Trespasser—One who does an unlawful act to the person or property of another.

Trustee—One who receives and holds property for another.

Turpitude—Inherent depravity.

Unconstitutional—In violation of some constitutional provision.

Vendee—The purchaser of property.

Vendor—The seller.

Verdict—The finding of the jury on the facts presented.

Vested—Having an immediate right.

Vindictive Damages—Punitive damages.

Warranty—An assurance by the seller of a condition of fact in relation to the property sold.

THE LAW OF DRUGS AND DRUGGISTS

INTRODUCTION

COURTS, REPORTS, STATUTES, COMMON LAW

Courts

Many persons have but a vague idea of the purposes and jurisdiction of the courts. To avoid confusion, it is well to keep in mind the fact that there is a dual system of courts in this country. There are, on the one hand, those of the United States, and, on the other, those of the several states. The number, name, and jurisdiction of the state courts differ materially in the different states, since each state, by its Constitution or statutes, establishes its own courts and defines the jurisdiction of each. An attempt is here made to give a brief description of the usual courts, though, as stated, the systems of courts in the various states differ greatly.

City Courts

Probably more people are familiar with the machinery of the city courts than with that of all the other courts combined. Each city has its ordinances and a court to enforce them, or rather to punish when an ordinance is not obeyed. This court is usually known as the police court, municipal court, city court, mayor's court, or inferior court.

Whether a particular case will be tried in a city court depends upon the existence of a city ordinance covering the specific conduct concerning which complaint is made. It is well to be familiar with the city ordinances as far as they apply to a particular business or line of conduct.

Justice of the Peace

Another court of inferior rank is the justice of the peace court, which has jurisdiction in minor civil and criminal cases arising either in the township, county, or other small district designated by the state statutes. In civil cases the jurisdiction is usually limited to controversies involving less than two or three hundred dollars, and, in criminal cases, merely to preliminary hearings of grave crimes, or to lesser offenses falling under the classification of misdemeanors.

County Courts

In many states there has been established a county court having a more extensive jurisdiction in both civil and criminal cases than the justice of the peace courts. Often in civil matters it is empowered to try and determine suits involving property of two or three thousand dollars' value. In some cases it may grant divorces if the property to be settled is not in excess of the limit provided by statute. In some states this court is given jurisdiction over all probate matters, juvenile court cases, and a wide range of criminal matters of a minor nature.

State District Court

The state district court is the trial court of general jurisdiction; there being no limit or restriction on cases either civil or criminal that may come before it. Many cases from the lower courts are appealed to the district court. This court is variously designated as the district court, circuit court, superior court, or nisi prius court.

In dealing with state courts, it must be kept in mind that the name and jurisdiction of these courts vary greatly, and, in case of large cities, there is often created by statute a court with special jurisdiction, given a distinctive name. Under some title, however, every state has trial courts of general jurisdiction. In this court formal pleadings are required, and the cases are usually tried by experienced attorneys.

State Supreme and Appellate Courts

In each state there is a court of last resort, usually known as the state Supreme Court. In a few states it is known as the

Court of Appeals, or Court of Errors and Appeals, and the Supreme Court is an inferior court.

A dissatisfied litigant has a right to appeal from the lower courts to these higher courts. The opinions of the judges in these higher courts are printed for future use, and each volume of opinions is known as a "Report." From these reports much of the material for this book has been collected.

United States Courts

The principal federal courts are the United States Supreme Court, the United States Circuit Court of Appeals, and the United States District Court. The District Court is the trial court of general jurisdiction of federal cases, and is the court in which violations of federal drug laws are tried. In each state there is at least one United States District Court, presided over by a federal judge. From the District Court appeal may be taken to the Circuit Court of Appeals or the Supreme Court of the United States. These courts derive their jurisdiction from the Federal Constitution or federal statutes. (For additional information on courts see "readings.")

Readings: Courts—Names, Jurisdictions, and Powers.

1. Long's Federal Courts, text.
2. Rose's Federal Jurisdiction and Procedure (2d Ed.) text.
3. Dobie on Federal Jurisdiction and Procedure.

Printed Reports of Opinions

As previously stated, there is a Supreme Court of the United States, and a Supreme Court, or some other court of final jurisdiction in each state. The opinions of these courts as written by the judges, are reported in the National Reporter System. They are also reported in the State Reports called United States Reports, Massachusetts Reports, Wyoming Reports, etc., indicating their source.

Common Law

There are federal statutes and state statutes, the former containing the acts of Congress and the latter the enactments of the state legislatures. These statutes are often thought of as con-

stituting all the law of the land. But in addition there is a large body of unwritten or nonstatutory law which has been built up during the course of the years through judicial decisions declaratory of immemorial custom. For instance, in many jurisdictions much of the law of contract consists of common law. The common law is part of our English heritage. In England the judges have for centuries considered usages, customs, rules, and maxims in deciding cases not controlled by statutory law. To quote the words of Chancellor Kent, a learned American jurist, "The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property which do not rest for their authority upon any express and positive declaration of the will of the legislature."

In addition to adopting much of the common law of England in force at the time the colonies were established, most of the states continued to develop the principles of common law in order to meet the changing conditions of a developing country.

It is of interest to note that by far the largest proportion of our law is to be found in the so-called common law. In the majority of the states it has been adopted as the basic law of the commonwealth by definite enactment.

Readings: The Common Law Explained.

1. Adoption of the Common Law in the United States. McKennon v. Winn, 1 Okl. 327, 33 P. 582, 22 L. R. A. 501.
2. Extent of Adoption of the Common Law. Kroeger v. Twin Buttes R. Co. (1911) 13 Ariz. 348, 114 P. 553, Ann. Cas. 1913E, 1229.

Constitutions—Federal and State

Judge Story, an early Justice of the United States Supreme Court, defined a constitution as "a fundamental law of government, established by the people, in their original sovereign capacity to promote their own happiness, and permanently to secure their rights, property, independence, and common welfare." In America the Federal and State Constitutions are in writing. The purpose of each is to prescribe the framework of the system of government, to provide for the different departments, and assign powers and duties to each. A State Constitution must not be in conflict with the Federal Constitution, and a state statute must not be in conflict with either.

Statutes—Federal

The Congress of the United States meeting at Washington enacts laws called "federal statutes." All the acts passed at a single session of Congress are known as the "Statutes at Large." Federal statutes, unless definitely restricted, have general application throughout the United States. Naturally among the multitude of federal statutes are a number relevant to the subject-matter of this book.

Statutes—State

Each state legislature meets periodically, in most instances every two years, though in a few states annual sessions are regularly convened, and in some cases oftener. During these sessions many laws are passed which, of course, are in operation only in the state wherein they are enacted. The acts of a single session of a state legislature are usually known as the "Session Laws." In each state, at frequent intervals, all the acts of a public nature are collected and arranged in a volume, usually called "Revised Statutes," "Revised Laws," "Compiled Laws," or "Code." Statutes of the different states vary widely, and the statutes of any given state are subject to repeal or amendment by the legislature of that state.

Ordinances

In a large measure the business of the druggist is regulated by federal and state laws, but cities also may add their restrictions and regulations to those made by the state and the nation. Each city has its governing body which has authority to pass ordinances for the regulation and control of its inhabitants and of the property within the city limits. A city may pass ordinances requiring a license or occupation tax; regulating the use or sale of trading stamps, explosives, poisons; relating to buildings, ashes, sidewalks, parking, signs, awnings, fences and many other things. A person who has lived for some time in a city is naturally more or less acquainted with such regulations, but a newcomer should immediately inform himself concerning them by consulting the city ordinances or by making inquiry of the city clerk, city attorney, city manager, mayor, a councilman, or an alderman.

Case Law Furnishes Many Rules of Law

In addition to the cases which explain and interpret federal and state statutes, there are many cases important from the fact that they state the general principles which constitute our common law. In these cases we have definitions and explanations of negligence, contributory negligence, proximate cause, degree of care and skill required, warranties, false arrest, assault and battery, explosives, poisons, measure of damages, procedure, and many other subjects intimately involved in our subject-matter.

What State Courts Try Drug Cases

If a druggist has been unfortunate enough to fail to comply with a city ordinance, the case will be tried in the first instance in the city court from which, of course, there is an appeal to a higher state court. If the offense is in violation of a state statute, the case probably will be in the state trial court of general jurisdiction, known as the district court, circuit court, nisi prius court, or superior court. In a few instances there may be a preliminary hearing in the justice of the peace court or even the county court. There is a right of appeal from the trial courts to the Supreme Court of the state.

What Federal Courts Try Drug Cases

There are a great many federal statutes which either directly or indirectly regulate the drug business, and the number of such statutes is constantly increasing. A case brought for violation of a federal statute, or based upon diversity of citizenship of the litigants, or other grounds giving the federal courts jurisdiction, will be tried in the United States District Court, with the right to appeal to the United States Circuit Court of Appeals or the United States Supreme Court.

PART I

STATE AND LOCAL LAWS

CHAPTER 1

STATE BOARD OF PHARMACY

State Board of Pharmacy—Membership

In each state there are laws providing for a state board of pharmacy, consisting usually of five or six members, in most cases appointed by the Governor of the state. The qualifications vary somewhat, but in most states members of the board must be registered pharmacists actively engaged in the practice of pharmacy. Some states require a five or ten year period of active practice preceding the appointment. In many cases teachers or instructors in pharmaceutical schools are not eligible for membership on the board.

Remuneration

In some states no salary is paid to the members of the state board of pharmacy. Others pay all members a sum varying from \$5 to \$15 a day while actively engaged in the work of the board, while a third group of states pays an annual salary regardless of the number of days actually employed. It is customary to pay the secretary of the board an annual salary, and in some cases he is not a member of the board.

Duties

Generally speaking, it is the duty of the state board of pharmacy to make such by-laws and regulations as are necessary appertaining to the lawful performance of their duties, and as to the granting and revoking of licenses to practice pharmacy. They must examine applicants, register pharmacists and assistant pharmacists, and take the initiative in prosecuting offenders against the pharmacy laws.

Duties of State Board of Pharmacy

In some states the powers and duties of the state board of pharmacy are specifically enumerated in the statutes. The New York statute is inserted as an example.

N. Y. Laws 1927, c. 85

- Statute:*
- (a) To regulate the practice of pharmacology.
 - (b) To regulate the sale of drugs, chemicals, medicines and poisons.
 - (c) To regulate the employment of apprentices and employees in pharmacies.
 - (d) To regulate the working hours and sleeping apartments of employees in pharmacies.
 - (e) To regulate and control the character and standard of drugs and medicines compounded and dispensed in the state, to employ inspectors and chemists, to secure samples and to prevent the sale of such drugs, chemicals, medicines and poisons as do not conform to the formulæ, standards and tests of the pharmacopœia and formulary.
 - (f) To regulate the retailing of poisons and to adopt schedules.
 - (g) To issue temporary permits limited to definite areas.
 - (h) To investigate alleged violations of the provisions of this article, to conduct hearings in respect thereto when, in its discretion, it appears to be necessary, and to bring the same to the notice of the attorney-general.

Source of Power of State Boards of Pharmacy

The protection of the life and health of the inhabitants is one of the primary duties of a state government. To accomplish these ends it is customary for state legislatures to make provision for certain boards, as boards of health, boards of pharmacy, hospital boards, and others. Usually, by statute, express powers are conferred upon these boards. In addition to the express powers are also such implied powers as are necessary to enable the board to carry out its express powers and to accomplish the object for which it was created.

Statutes enacted for the purpose of preserving public health and welfare are as a rule liberally construed. Such being the case, there has been considerable litigation over acts of boards of pharmacy in some of the states. It is easy to see how any one with a grievance would attempt to restrict a board to its express powers, if by so doing he could gain the point desired. While broad powers on the part of the board might work some individual hardship, it is patent that the good of the whole is more easily preserved by that means. Generally the courts favor a liberal construction.

Readings: Legislature may Delegate Authority to State Board of Pharmacy.

1. Legislature Cannot Delegate Arbitrary Power to Regulate Sale of Patent Medicines to Boards of Health. *Fougera v. New York*, 224 N. Y. 269, 120 N. E. 642, 1 A. L. R. 1467.
2. Similar Statute in Illinois Held Unconstitutional.
 - (a) *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238.
 - (b) *Saddler v. People*, 188 Ill. 243, 58 N. E. 906.

Liability of Individual Member of Board

In a few cases, when a state board of pharmacy has refused to grant a license, to renew a license, or when a license has been revoked, the disappointed applicant has brought a damage suit against an individual member of the board. Usually the individual member has not been held liable, because the ruling has been held to be the action of the board, and, if the board has acted in good faith, without malice or personal interest, and within its legal powers, there is no liability to an individual member. It is not impossible, though, for an individual member of a board to so misuse his power in his capacity as a member of the board as to make himself liable in damages to the aggrieved party.

Enforcement of Laws

In some states it is provided by statute that the board of pharmacy has authority to proceed to recover penalties for violation of pharmacy laws. In other states the offender is proceeded against as in other criminal cases, by indictment, information, or otherwise. In some of the cities there are ordi-

nances regulating certain acts of a druggist, and for violation the offender is proceeded against in the police court or municipal court. Of course, most actions against a druggist are brought by individuals claiming damages for injury resulting from negligence in the conduct of the business.

Readings: Liability of Members of Board of Pharmacy for Official Acts. *Monnier v. Godbold* (La. 1906) 116 La. 165, 40 So. 604, 5 L. R. A. (N. S.) 463, 7 Ann. Cas. 768.

Licenses—Qualifications

Generally speaking, a person has a right to pursue any lawful calling with whatever education and experience he may possess. In some professions, however, the necessity for special qualifications is so great and the consequences of the lack of such qualifications so likely to result in injury that the state legislatures have seen fit to prescribe reasonable conditions under which these professions may be practiced. Among such professions is that of pharmacy. In addition to scholastic requirements provided by statute, the possession of honor and high moral character are commonly qualification for the practice of pharmacy, and the state board of pharmacy has the same general right to pass upon it as it has to pass upon other qualifications.

Refusal to Grant License or Revocation of License

As stated in a preceding paragraph, the power to grant licenses for the practice of pharmacy has been delegated to boards of pharmacy. As a necessary incident to this power is that of refusing to grant licenses or of revoking or rescinding such licenses as are already in force. The fact that a pharmacist has once been granted a license does not give him a vested right to continue to practice his profession indefinitely regardless of moral and professional conduct and standards. There are statutes which provide that the state board of pharmacy may refuse to grant a certificate to any person guilty of a felony or of gross immorality, and which also give it the power to revoke a certificate already granted if the holder is guilty of such acts. The procedure to be used in the revocation of a certificate is usually regulated by statute, as also are the causes justifying such revo-

cation. Such statutes do not define specifically every act of unprofessional or dishonorable conduct which would justify a revocation of license, but a few definite offenses are noted, as the habitual sale of intoxicating liquors or of habit-forming drugs contrary to law, or gross immorality.

Obtaining a Temporary Certificate in North Dakota

N. D. Comp. Laws 1913, § 501

*Statute:*¹ The Secretary of the State Board of Pharmacy, or any member of said board, on being requested by the secretary in writing, may examine applicants orally or in writing, and issue a temporary certificate to practice pharmacy, which shall authorize such practice and be valid until the next meeting of the board. Only one temporary certificate shall be issued to the same applicant, and no temporary certificate shall be issued to any person whose application has been acted on by the board. The applicant for a temporary certificate shall pay to the person making the examination the same fee as provided by this act for an examination by the board, and such fees when paid shall be for the benefit of the said board and shall be delivered to the secretary by the person making the examination. (This statute is used as an example; there being similar statutes in other states.)

Grounds of Refusal to Renew a License

*Case:*²

PEOPLE v. STATE BOARD OF PHARMACY.

Supreme Court of Illinois, 1916. 275 Ill. 236, 114 N. E. 22.

In Illinois in 1916, Samuel Sucherman filed his petition for a writ of mandamus in the circuit court of Cook county against the state board of pharmacy alleging that he was entitled to a renewal of his certificate of registration, and that it had been

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unlawfully refused by the said board. In response to his application for a renewal he had received the following letter from the secretary of the board:

"I have your letter of January 15, with the inclosed check for \$1.50 for the renewal of the registered pharmacist certificate of Samuel Sucherman. The certificate of Dr. Samuel Sucherman was suspended because it was found in the possession of another party who was representing himself as a registered pharmacist. I am instructed by the board of pharmacy not to renew the certificate and am therefore returning your check."

Question: Under the Pharmacy Act of Illinois, did the state board of pharmacy have a right to refuse a registered druggist a certificate of renewal of his license, for the reason indicated in the above letter?

DUNCAN, J. The appellant (state board of pharmacy) had the right to refuse relator's certificate of renewal only on these four grounds: (1) Failure to pay the required fee; (2) that he had been proven to be so addicted to the excessive use of stimulants or narcotics as to render him unsafe to handle or sell drugs, medicines, and poisons; (3) that he had been proven not to be of good moral character; and (4) that he was not engaged in the active practice of pharmacy. The petitioner negatived the existence of any and all of such grounds of disqualification, and showed, in addition thereto, that the relator had been granted other renewals by the board, and had had a renewal certificate for the previous year, 1915. * * * The statute does not authorize appellant to refuse to renew a certificate merely because the same was found in the possession of some other person. Appellant did not, by its letter or otherwise, undertake to show that the same was in possession of another person through any misconduct of the relator. [The state board of pharmacy had no authority to deny the certificate.]

Review of People v. State Board of Pharmacy:

1. What writ did the plaintiff use?
2. Why was the action against the state board of pharmacy?

Then a brief statement of the facts is inserted, followed by a question, to which the court's decision is an answer.

It will be noted that immediately preceding the decision are words "Per Curiam," or the judge's name with the letters "J.," "C. J.," or "D. J." Per Curiam means the entire court; J., Justice; C. J., Chief Justice; D. J., District Judge. The decision then follows in the exact words of the court.

3. Why had the certificate been suspended?
4. Why does this case come under the Pharmacy Act of Illinois?
5. For what reasons could the state board of pharmacy refuse to renew a certificate?
6. Was the druggist disqualified under any of these statutory reasons?
7. Was it the fault of the druggist that his certificate was in the possession of another person, who attempted to use it?
8. Formulate a suitable rule for the case.

Gross Immorality Defined

What constitutes gross immorality has been the subject of judicial determination. In *Moore v. Strickling*, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279, the court defined gross immorality thus: "The question of gross immorality must be determined according to the common understanding of the ordinary law-abiding and reasonable citizen of the country, and not according to those who are highly developed ethically, or those on the other hand, who are suffering from moral depravity. The word 'gross' as used in this connection does not mean 'great and excessive,' but rather willful, flagrant, or shameful, showing a moral indifference to the opinions of the good and respectable members of the community and to the obligations of the position held by the delinquent."

License Revoked for Crime

There are certain state statutes which provide that on the conviction for certain crimes, as the unlawful selling of cocaine, the license of a registered pharmacist shall thereby be revoked. The question as to the possibility of having a license so revoked renewed by making the usual application sometimes arises. A number of states do not permit the renewal of a license which has been revoked by force of a statute making conviction for certain crimes grounds for revocation. Even when not specifically prohibited, a board usually will not grant a renewal, for by so doing the very purpose of the statute, to keep unworthy persons out of the profession, is defeated. The board cannot be compelled, even upon a writ of mandamus, to reissue such license.

Mandamus to Secure License

An applicant who is unable to secure a license, or to have one reissued, naturally feels aggrieved and sometimes resorts to the courts for legal redress in the form of a writ of mandamus. To what extent, then, may the actions of a board be controlled in the exercise of its duties in granting licenses? The general rule is that, if the board is invested with judicial powers to pass upon the qualifications of applicants, or discretionary powers to issue the licenses, a writ of mandamus will not lie to review its actions. If the board has been given discretionary power, it is impossible for action of a court to be substituted for judgment of the board, but if, on the other hand, the board merely exercises administrative and clerical functions in issuing licenses, mandamus will lie if a clear legal right is shown. Where a statute sets forth the conditions precedent for registration, and if a person possesses all the qualifications and performs all the conditions precedent, he has a right to be registered as a pharmacist. For example, when a statute provides that a graduate of a reputable college of pharmacy is entitled to a license, a board of pharmacy may be compelled by mandamus to license a graduate of such college. A state or municipal corporation may not discriminate between persons equally qualified engaging in any lawful business. The conducting of a pharmacy is a lawful business, and therefore, under the guise of regulation, neither state nor city may delegate to any person, or group of persons, the right arbitrarily to select persons who may engage in the business and reject others equally qualified. A person who has performed all the conditions and qualifications is entitled to his license, or renewal of license, as the case may be, and may compel its issuance by mandamus. We find in *State v. Dental Examiners*, 38 Wash. 325, 80 P. 544: "It is well established that courts will compel by mandamus the honest performance of official duty, and if, under the pretense of exercising discretion the power is exercised with manifest injustice, or grossly abused, or duty avoided, the courts will grant relief. The action of the court must be based upon the assumption that the inferior tribunal has refused to exercise the discretion with which it is clothed, because if it acts arbitrarily, or fraudulently, or through unworthy or selfish motives, or conspires against the rights of individuals under the law, and therefore against the law itself, it has not strictly, as is frequently said, abused its discretion, but, in contemplation of law it has not exercised its

discretion at all, but has sought to substitute arbitrary and fraudulent disposition and determination of the question submitted, for honest discretion demanded by the law."

Annual Registration

Though a pharmacist may be regularly licensed, the state may ask, in addition, for an annual registration of his place of business. Statutes to this effect provide "That every place in which drugs are retailed shall be annually registered." Usually a small registration fee is required. Such a statute does not deny a licensed druggist the right to follow his occupation, but merely provides the state with an opportunity to keep him under cognizance. Many states require, in addition to annual registration, that the certificate of registration be displayed in his place of business.

Purpose of Annual License Fee

Case:

DE GRUY v. LOUISIANA STATE BOARD OF PHARMACY.

Supreme Court of Louisiana, 1917. 141 La. 896, 75 So. 835.

The plaintiff obtained a writ of injunction to prevent the defendant from enforcing certain provisions of the law, which, the defendant contends, required every registered pharmacist and qualified assistant to apply for a renewal of his certificate annually and pay therefor \$1.

Question: Whether the annual charge of \$1, imposed upon every registered pharmacist and qualified assistant for the renewal of his certificate, is an exercise of the taxing power of the state, a license tax levied for revenue, or of the police power imposed for carrying out police regulation.

O'NEILL, J. The plaintiff's objections to the constitutionality of the law are all founded upon the assertion or premise that the annual charge of \$1 for the renewal of the certificate of every registered pharmacist and qualified assistant is a license tax. If that is a false premise, there is nothing in the contention—in fact there is then no contention—that the law is unconstitutional. And our opinion is that the plaintiff is mistaken in

assuming that this charge of \$1 to be paid annually by every registered pharmacist and qualified assistant, for the renewal of his certificate, is a license tax. It is a fee charged for a service rendered in protecting, not only the public against the malpractice of pharmacy, but the profession of the pharmacists themselves against imposters. The levying and collecting of this fee of \$1 annually from every registered pharmacist and qualified assistant is not done in the exercise of the taxing power of the state, but in the exercise of the police power. The purpose of the charge is not to derive a revenue, but to pay the expense of carrying on the police regulation provided by the statute. It is true that the labor of issuing renewal certificates is, of itself, not worth \$1, or does not cost the board \$1. But the functions of the board are something more than swapping dollars. The dollar collected annually from every registered pharmacist and qualified assistant, in consideration for the renewal of the certificate, is expended not only for maintaining office of the board and paying for the clerical work, but also for investigating complaints against and correcting the evil practice of having non-registered, nonqualified, and incompetent persons compounding dangerous drugs. The regulation of matters of such vital importance to the health and safety of the public as that is surely within the police power of the state. The evidence shows that the board needs, for carrying on the work for which this fee is collected annually from every registered pharmacist and qualified assistant, every dollar collected, and more.

Review of De Gruy v. Louisiana State Board of Pharmacy:

1. What form of remedy did the plaintiff use?
2. What did the plaintiff wish to accomplish by his remedy?
3. What three questions were involved?
4. Why did the plaintiff object to the constitutionality of the law?
5. What is a license tax?
6. Why was the \$1 charged?
7. Why was this not an exercise of the taxing power of the state?
8. Why was it an exercise of the police power?
9. How was the sum collected actually expended?
10. Formulate, in your own words, the rules of law in the case.

Grounds for Revocation of License

Iowa Code 1924, § 2492

Statute: A license to practice a profession shall be revoked or suspended when the licensee is guilty of any of the following acts or offenses:

1. Fraud in procuring his license.
2. Incompetency in the practice of his profession.
3. Immoral, unprofessional, or dishonorable conduct.
4. Habitual intoxication or addiction to the use of drugs.
5. Conviction of an offense involving turpitude.
6. Fraud in representations as to skill or ability.
7. Use of untruthful or improbable statements in advertisements.
8. Distribution of intoxicating liquors or drugs for any other than lawful purposes.
9. Willful or repeated violations of this title, the title of "Public Health" or the rules of the State Department of Health.
10. Continued practice while knowingly having an infectious or contagious disease.

License Revoked for Unlawful Sale of Cocaine, and Renewal Refused

Case:

THOMAS v. BOARD OF PHARMACY.

Supreme Court of North Carolina, 1910. 152 N. C. 373, 67 S. E. 925.

Mandamus to compel the board of pharmacy to renew a license. On August 16, 1909, the plaintiff was indicted in the superior court of Davidson in four several indictments for the unlawful sale of cocaine, and pleaded guilty to all four indictments. On September 1, 1909, he made application to renew his license, tendering payment of \$2. This being refused, he brought this proceeding by mandamus to compel the defendant board to renew his license.

Question: Whether the plaintiff, who had pleaded guilty to the sale of cocaine in violation of law, could, by the writ of mandamus, compel the board of pharmacy to renew his license.

CLARK, C. J. Upon the above facts, which are uncontradicted, his honor properly refused the writ. By the very terms

of the statute the conviction upon a plea of guilty was a revocation of the plaintiff's license. The board was therefore not authorized to accept the \$2 and renew a license which had been revoked.

Whether the plaintiff could be reinstated upon an examination and a new license, or whether the revocation of his license was final unless and until the legislature has prescribed some method by which a pharmacist whose license has been forfeited by a conviction of crime can be restored, is a matter not now before us. Upon conviction of felony, the right to vote is forfeited, and can only be restored in consequence of an act of the legislature and in a method therein prescribed.

By Revisal 1905, sections 4480, 4481, an applicant for license who has passed his examination before the Board of Pharmacy and been granted a license must apply on September 1st of each succeeding year for a renewal thereof, which is granted upon his payment of \$2, "if the Board of Pharmacy shall find that the applicant is entitled to renewal thereof." Revisal 1905, section 4484. Here the board, in view of the conviction, and the provision of law which makes the conviction a revocation of the license, found that he was not entitled and properly refused to grant the renewal. The annual renewal would be a useless formality if the board were bound to grant it in all cases. The selling of drugs is an important matter to the health and lives of the public. The legislature has carefully guarded it by the provisions to be found in Revisal 1905, sections 4471-4490. The sale of cocaine and other deleterious drugs is the subject of carefully drawn provisions. The plaintiff knew that the violation of those provisions subjected him to fine and imprisonment in the discretion of the court, and to a revocation of his license, the latter not being discretionary, but the necessary result of his conviction. The evidence was so clear that the plaintiff pleaded guilty, and the facts found by his honor show a case of great turpitude, yet the plaintiff in less than 10 days thereafter applied for a license, and contends that the payment of \$2 entitles him to resume the important business of selling drugs.

Review of Thomas v. Board of Pharmacy:

1. What was the purpose of the action?
2. For what misconduct had the plaintiff been indicted?
3. Why did he plead guilty?
4. Why did the board refuse to renew his license?
5. How is the question stated?
6. Why could the board not renew the license?

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7. What questions were presented but not answered by the court?
8. What was said about forfeiting the right to vote?
9. In such cases, why should a renewal not be granted?
10. Why was this a case of great turpitude?

Revocation of License Secured by Fraud

Case:

MANDEL v. BOARD OF REGENTS OF UNIVERSITY OF STATE OF NEW YORK.

Court of Appeals of New York, 1928. 250 N. Y. 173, 164 N. E. 895.

In June, 1925, the petitioner procured a license to practice pharmacy as a junior pharmacist. He presented satisfactory proof of his qualifications for that license. Before he could obtain a license to practice as a pharmacist, satisfactory proof of additional qualifications was required. In order to obtain that license, the defendant sought to manufacture evidence of qualifications he did not in fact possess. Upon proof of the attempted fraud and after notice to the defendant and a hearing before the state board of pharmacy, the petitioner's license as a junior pharmacist was revoked.

Question: Was the revocation of the license for unfitness justified, where the accused had sought to manufacture evidence of qualifications in order to obtain a license?

LEHMAN, J. The Legislature has vested in an administrative board power to determine the fitness and competency of those who desire to practice pharmacy in this state, both before and after a license has been granted. The board has revoked the license of the petitioner as "junior pharmacist," but not because that license was obtained by fraud, but because it has found that the petitioner was "guilty of fraud in endeavoring to procure a pharmacist's license and consequently was and is unfit to practice the profession of pharmacy under any form of a license."

Review of Mandel v. Board of Regents of University of State of New York:

1. Was the petitioner a qualified junior pharmacist?
2. What evidence did the defendant seek to manufacture?

3. What fraud did he commit?
4. What license was revoked?
5. Formulate a suitable rule of law on the case.

Readings: Granting and Revoking Licenses of Druggists.

1. License is Not a Tax upon the Business of Pharmacy. *State of Minn. v. Hovorka* (1907) 100 Minn. 249, 110 N. W. 870, 8 L. R. A. (N. S.) 1272, 10 Ann. Cas. 398.
2. License Revoked for Gross Immorality. *Indiana Board of Pharmacy v. Haag* (1916) 184 Ind. 333, 111 N. E. 178.
3. Annual Registration. *People v. Roemer* (1915) 168 App. Div. 377, 153 N. Y. S. 323.
4. In Charge of Drug Store in Violation of Statute; Cannot Recover for Services. *Shattuck v. Watson* (1910) 164 Mich. 167, 129 N. W. 196.
5. Mandamus to Secure License. *State ex rel. Mauldin v. Matthews* (1908) 81 S. C. 414, 62 S. E. 695, 22 L. R. A. (N. S.) 735, 128 Am. St. Rep. 919, 16 Ann. Cas. 182.

Unlawful Use of Title of Druggist or Pharmacist

Idaho Code 1932, § 53-2010

Statute: It shall be unlawful for any person, not legally licensed as a pharmacist, to take, use or exhibit the title of pharmacist or the title of druggist or apothecary, or any other title or description of like import; and it shall be unlawful for any person, not legally licensed as an assistant pharmacist to take, use or exhibit the title of assistant pharmacist, or any other title or description of like import.

Board may Determine What Constitutes a Reputable College

In some states a member of one of a group of enumerated professions may be granted a license to practice his profession upon presentation to the proper board of a diploma "of a reputable school or college." In states where such statutes are in force, the board has discretionary power as to what schools are within the statute. Unless the discretion is evidently abused, or exercised with manifest injustice, the board cannot be controlled by the courts through writs of mandamus. "Were the rule otherwise, instead of officers discharging their duties in accordance with their own official discretion, that of a court

would be substituted therefor." *State v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565.

Reciprocal Registration

The question frequently arises as to how a pharmacist or an assistant pharmacist registered in one state may secure the right to practice his profession in another state. As a general rule, a state board of pharmacy may, upon application, issue licenses to persons legally registered or licensed as pharmacists or assistant pharmacists in other states or even in foreign countries. However, the board will consider applications only from persons registered in such states as have equivalent standards for registration and which will reciprocate on the same basis. The applicant must satisfy the board as to his morality, sobriety, and careful observance of important laws touching the life and conduct of a pharmacist. He must also present proof of his preliminary education, technical training, and experience. Even after such proof has been given, it is entirely within the discretion of the board to refuse or to grant the license. The applicant must pay the usual fees, and must indicate his intention to begin the practice of his profession when the certificate is granted.

Validity of Contracts Made by Unlicensed Druggist

If a license to practice pharmacy is required by statute, it is for the purpose of protecting the public and to prevent improper persons from acting in the capacity of druggists. If, then, an unlicensed person sells drugs and takes a note in payment, it would be a good defense, between the original parties, that the plaintiff did not have a license to sell drugs. Usually contracts founded on acts prohibited by statute under a penalty are void. Where a statute required that a drug store must be under the personal supervision of a registered pharmacist, and where one, not a registered pharmacist, conducts the business for another, he cannot, in suit, recover for such services against his employer.

✓ Physician Not a Druggist

In every state in the Union there are statutes making it mandatory for a person conducting a drug store to obtain a license for that purpose. Because a physician has a license to practice medicine, which carries with it the privilege of filling his own

prescriptions for his own patients, it does not give him the right to conduct a drug store. The fact that he is amply qualified to fulfill all the duties required of a pharmacist has nothing to do with the question. This is very definitely stated by Justice Morse in *People v. Moorman* (1891) 86 Mich. 433, 49 N. W. 263: "If a physician wishes to keep open shop, or, in other words, a drug store, he must come under the same regulations as other persons; and he has no more right than any other person to step into a drug store, and to compound or sell drugs, medicines or poisons to one not his patient. It may be that he is as competent to do this as a registered pharmacist, or his registered assistant, but he has no vested right to do so. The law, as I understand it, does not interfere with him in the legitimate practice of his profession in which he is registered. If he wishes to do more than this, he must comply with the reasonable regulations of the pharmacy act."

A Kentucky statute (Ky. St. 1930, § 2632) provides that "Nothing in this act shall apply to or in any manner interfere with, the business of any licensed or practicing physician, or prevent him from supplying to his patients such articles as may seem to him proper or with his compounding his own prescriptions." Most states prohibit a physician from filling a prescription for another physician, but in New York it has been held that this is no violation of the law. *Suffolk County v. Shaw*, 21 App. Div. 146, 47 N. Y. S. 349.

Readings: A Physician has No Right to Sell Drugs without a License.

1. Right of Physician to Sell Drugs. *Commonwealth v. Hovious* (1902) 112 Ky. 491, 66 S. W. 3, 23 Ky. Law Rep. 1724.
2. Physician Sold Drugs without Having a License. *People v. Moorman* (1891) 86 Mich. 433, 49 N. W. 263.

✓Druggist Not a Physician

Many persons, not wishing to consult a physician concerning some illness, ask druggists to suggest a remedy. To a certain extent it is permissible for a druggist to comply with their requests, especially if he makes it clear to his customers that he is not a physician and not acting in any such capacity. The license which authorizes a person to practice pharmacy does not license him to practice medicine. This has been the source of

prolific litigation and even prosecution in England, but apparently has not been before the higher courts of the United States on many occasions. In the Massachusetts case, *Commonwealth v. St. Pierre*, 175 Mass. 48, 55 N. E. 482, the court said: "If the defendant sold the medicines receiving pay therefor, and gave advice gratuitously as to the use to be made of them, he was not, so far as those instances were concerned, holding himself out as a physician." It must be kept clearly in mind, though, that a license to practice as druggist is in no sense a license to practice medicine. It is not easy to draw the line between merely explaining the use and properties of a drug and in prescribing for an ailment, and so great care should be exercised not in any way to exercise the function of a physician.

"Practice of Medicine" Defined by the Courts

Digest of Cases:

1. Under an Ohio decision, if a person examines patients, diagnoses their disease, and then prescribes and sells his own proprietary medicines, he is practicing medicine, notwithstanding his ostensible and apparent motive may be the sale of his medicines. *Tucker v. Williamson* (D. C. 1915) 229 F. 201.

2. Diagnosing, prescribing, and treating ailments are constituent parts of "practice of medicine." *People v. T. Wahling* (1926) 79 Cal. App. 286, 249 P. 229.

Prosecution for Practicing Medicine without a License— Meaning of "Practicing Medicine"

Case:

STATE v. MILLER.

Supreme Court of North Dakota, 1930. 59 N. D. 288, 229 N. W. 569.

The information charged the defendant with the crime of practicing medicine without a license in violation of section 463, Compiled Laws 1913 of North Dakota.

Question: What is meant by the term "practicing medicine"?

BURR, J. The term "practicing medicine" is not concerned with the efficacy of the remedy. When one diagnoses disease and prescribes and applies any therapeutic agent as a remedy, he is, in a broad sense, practicing medicine. To "prescribe"

means more than suggestion or opinion. It means to direct the use of a medicine. See Webster. Where one claims to be able "to explain how * * * incurable disease may be cured," it is not surprising that some may be credulous enough to believe, and where such a one comes to have his ailments diagnosed, his ills discovered, the proper remedy given, and the claimant undertakes this, makes his diagnoses, states the illness, directs the use of certain medicines, and furnishes them for that purpose, either directly or indirectly, the latter must be considered as practicing medicine. The law involved here is for the protection of the public in the matter of public health against the ignorant, charlatan, and imposter. It is confined to the practice of medicine as a science and is aimed at those who profess to be what they are not. It does not pretend to interfere with a nurse, a minister, or a priest who furnishes assistance, advice, or instruction, or the narration of the values of time honored specifics. It permits anyone opposed to the practice of medicine, as generally understood, to show the folly of any system, the fallacious principles on which it is based, the superiority of any other method, or the relative value of different systems, whether empiric or otherwise. Faith or prayer as a cure, or the practice of religious ceremonies as a remedy, either physically or mentally, is not even remotely disputed, or the teaching of the cure of disease by exercise, diet, manner of living, or the use of religious rites.

Review of State v. Miller :

1. What crime was charged?
2. What question was raised?
3. Why is the above question important?
4. Define the meaning of "practicing medicine" in a broad sense.
5. Explain the meaning of "to prescribe."
6. For what kind of protection was this particular law passed?
7. With what class of persons does this law not interfere?
8. How much freedom is allowed in opposing the present medical systems?
9. Why does the law not interfere with religious ceremonies?

Evidence of Violations of Drug Laws

It is difficult to secure evidence of violation of drug laws. Citizens, as a rule, do not desire to make complaint or to start prosecution. In fact, few, if any, know whether the drug laws are being violated. In New Jersey by statute it is provided that inspectors may be hired to examine and inspect pharmacies. The statute is quoted.

State Board may Employ Inspectors

N. J. 3 Comp. St. 1910, p. 3945

Statute: It shall be lawful for the state board to employ suitable persons as inspectors, whose duty it shall be to examine and inspect pharmacies, drug stores, and all places where drugs, medicines and poisons are kept, sold and dispensed at retail for the purpose of detecting violations of the provisions of this act.

Procuring Evidence of Sales of Narcotics

It is not unusual for officers to attempt to procure evidence showing that druggists are violating the laws in regard to the sale of narcotic drugs by making an effort to get the druggist to sell to them or their agents the unlawful substances. The advisability of this manner of procuring evidence is widely questioned, but many cases uphold the method and allow the admission of the evidence thus obtained into the trial of cases. In point is the case in which a police officer gave to the witness, John Burton, money with which to buy cocaine from the defendant. On the trial of the accused the evidence thus obtained was admitted, but the manner in which the evidence was procured was also admitted for consideration by the jury. The court declared that "while this method of securing evidence is not to be wholly commended or approved, it is sometimes true that the conditions surrounding the commission of crime are such as to make the securing of proper and competent evidence as to such act a very difficult task. When evidence is secured in the manner suggested, the method so employed and the credibility of the witness securing the same may properly be considered by the trial court or jury in seeing that justice is done." *Niswonger v. State* (1913) 179 Ind. 653, 102 N. E. 135, 46 L. R. A. (N. S.) 1.

CHAPTER 2

ENGAGED IN BUSINESS OR IN CHARGE OF A DRUG STORE

Engaged in Business

There is some confusion as to the meaning of the terms, "engaged in business" or "in charge of a drug store," as used in the statutes regulating the ownership or control of a drug store. In order to avoid any uncertainty, some of the more recent statutes define the application of these terms. Considerable litigation of this sort arises from the sale of drugs in sparsely settled regions. There it may be necessary for the druggist to deal in many articles other than drugs, and it may be necessary for him to be away from his place of business at times, leaving an unlicensed clerk in charge. Also, in rural districts, general merchandise stores may handle certain types of articles otherwise sold only in drug stores, which is permitted under restrictions in some states by statute. Uncertainty may exist whether such a sale is permissible at all, or as to what articles are in the class permitted to be sold.

Meaning of the Term "Engaged in Business"

Case:

STATE ex rel. MISSILDINE v. JEWETT MARKET CO.

Supreme Court of Iowa, 1929. 200 Iowa, 567, 228 N. W. 288.

Action in equity to enjoin the defendant, which is operating a grocery store, from selling aspirin. The court granted the injunction, and the defendant appeals.

The appellant (defendant) is a corporation engaged in the retail business of marketing groceries, meats, and food commodities in the city of Des Moines. It is not engaged in the occupation of operating a drug store, and does not have in its employ or among its officers any licensed pharmacists. It is admitted or established that, while so engaged in its general business of operating a grocery store and meat market, the appellant did at

divers times, in the year 1928, engage in keeping for sale in said store the drug commonly known as aspirin.

Paragraph 1 of section 2580 is as follows: "1. 'Drugs and medicines' shall include all substances and preparations for internal or external use recognized in the United States Pharmacopœia or National Formulary, and any substance or mixture of substances intended to be used for the cure, mitigation, or prevention of disease of either man or animals."

- Questions:* (1) Was the keeping for sale and selling of aspirin a violation of the Iowa statute?
(2) Was aspirin a "drug" within the meaning of the Iowa statute?

FAVILLE, J. One may properly be said to be engaged in a business, even though it is not his exclusive occupation. One is engaged in a business with regard to any particular article when he has such article for sale to any person who may apply for it for the seller's profit. The question is not determined by the number of sales that may be made. The word "business" has a variety of meanings, and is applied in a variety of ways.

* * *

We think the record brings the appellant within the terms and provisions of the statute as being engaged in the business of selling aspirin.

II. It is contended that aspirin is not a drug within the meaning of paragraph 1 of section 2578 of the Code. The expert evidence in the case showed that it is a drug. It is classified as a coal tar product. It is a remedial agent used in the treatment of disease. It is described in the record as "a potent, active drug." The evidence is amply sufficient to establish the fact that aspirin is a drug with decided physiological properties, and is used to cure, mitigate, or prevent disease.

The record shows that aspirin was originally a proprietary medicine. It was discovered in Germany, its formula was secret, and the product was originally made only by the possessor of this secret formula. However, the formula has been discovered, and aspirin is now made by different pharmaceutical and chemical manufacturers, and it has entirely ceased to be a proprietary medicine. Therefore, it does not come within the exception noted in the statute referring to proprietary medicines. [Injunction granted.]

Review of State ex rel. Missildine v. Jewett Market Company:

1. What was the object of the action?
2. When does a party become the appellant?
3. State the two principal questions.
4. When is a person engaged in business with regard to any particular article?
5. Why is the question not determined by the number of sales?
6. Why was aspirin considered a drug?
7. Give a brief account of aspirin.
8. Why is it not a proprietary medicine?
9. What is the purpose of an injunction?
10. Formulate two rules for the case.

Readings: Engaged in Business.

1. Engaged in the Business of Rectifying, Purifying, and Refining Distilled Spirits. *U. S. v. Smith, Kline & French Co.* (D. C. 1911) 184 F. 532.
2. Engaging in Business of Selling Liquor. *Hernandez v. State* (1911) 64 Tex. Cr. R. 73, 141 S. W. 268.
3. A Bona Fide Club, Not "Engaged in the Occupation or Business of Selling Liquors." *State v. Duke*, 104 Tex. 355, 137 S. W. 654, 138 S. W. 385.
4. In Sole Charge of Drug Store. *Shattuck v. Watson* (1910) 164 Mich. 167, 129 N. W. 196.

Unauthorized Use of Terms in New York

N. Y. Education Law (Consol. Laws, c. 16) § 1355

Statute: No person or corporation shall hereafter carry on, conduct or transact business under a name which contains as a part thereof the words "drugs," "medicines," "drug store" or "pharmacy," or similar terms or combination of terms, or in any manner by advertisement, circular, poster, sign or otherwise describe or refer to the place of business conducted by such person or corporation by the terms "drugs," "medicines," "drug store" or "pharmacy," unless the place of business so conducted is a drug store or pharmacy duly registered and authorized by the state board of pharmacy. Any person or corporation violating this section shall be guilty of a misdemeanor, and if a corporation, any officer thereof who knowingly participates in such violation, shall also be guilty of a misdemeanor.

Distinction between Licensed Druggist and Licensed Pharmacist in New York

"A great distinction exists between the qualifications required of a licensed pharmacist and those required of a licensed druggist. (Education Law, section 1353.) Pharmacy is a professional calling. Pharmacology is the science that treats of drugs and medicines; their nature, preparation, administration, and effect. (Education Law, section 1350, subd. 11.) Keeping a drug store is a trade or business in which medicines and other articles are sold. Druggists who have had experience in a drug store or pharmacy may sell drugs, but a pharmacist may undergo an arduous course of preparation, not unlike in length and thoroughness that of the physician or lawyer. The Legislature has ample power to regulate the calling of druggists and pharmacists by saying what acts in various parts of the state, grouped according to population, should be prohibited so as effectively to accomplish the purpose of such regulation, and by giving special advantages to the highly trained man when, in its wisdom, it deems it practicable to do so. The regulations in question are not to be condemned as unreasonable and unnecessary restrictions, arbitrarily interfering with private business under the pretext of protecting the public." Pound, C. J. in *Lutz v. Houck* (1933) 263 N. Y. 116, 188 N. E. 274, reversing 239 App. Div. 828, 264 N. Y. S. 937.

Under the New York classification, a licensed druggist is permitted to conduct his own business in towns not having a population of more than 1,000, and to be employed in a licensed pharmacy in towns not larger than 1,000,000.

Unlawfully Displaying Emblem Denoting Drug Store

Conn. Pub. Acts 1925, c. 230, § 7

Statute: Any person, firm or corporation owning, managing, or conducting any store, shop or place of business not being a licensed pharmacist or not having in his or its employ a licensed pharmacist for the supervision of the pharmacy department of such store, shop or place of business, exhibiting within or upon the outside of such store, shop, or place of business the words, "drug store," "pharmacy," "apothecary," or any combination of such terms or exhibiting within or without such store, shop or place of business or in connection therewith any show bottle or globe of colored glass, or filled with colored liquid shall be fined not more than two hundred dollars, or imprisoned not more than thirty days, or both.

Registered Pharmacist in Full Charge

Case:

HAAS v. PEOPLE.

Appellate Court of Illinois, 1888. 27 Ill. App. 416.

Merz Bros., being the owners of a drug store in Chicago, employed one Haas, appellant, a registered pharmacist, and placed him in charge of the store. In September, 1886, while appellant had such charge of the store, a boy named Goddard was also employed there by Merz Bros. He was instructed by August Merz, as well as by appellant, that he might sell anything in the store except poisons. Appellant testified that he supposed it was for the boy to judge what were poisons. In the latter part of September, 1886, when appellant was absent at dinner and the boy was left in charge of the store, an application was made by Charles W. Day to purchase some poisons, and the boy sold and delivered them to him. The appellant was summoned before a justice of the peace for the recovery of a fine for this alleged violation of the statutes. The justice rendered judgment for \$50, and the criminal court of Cook county, on appeal, rendered a similar judgment, which appellant now seeks to reverse. He claims that, as the store was not his, but belonged to Merz Bros., and as the boy was hired and could be discharged by them only, no penalty can be inflicted on a mere coemployee of the boy.

GARNETT, J. If such were the intention of the legislature, the enactment is a lame and impotent conclusion. If the registered pharmacist employed to take charge of the store is not chargeable with the penalty, neither is the owner, if he is not a registered pharmacist. Thus any person who has not qualified himself to discharge the responsible duties required by the statute, may employ a person who has qualified himself and the latter may, without fear of the prescribed penalty, permit any boy, or unskilled person employed in the store, to sell the prohibited articles, and the efficiency of the law becomes seriously impaired. A more reasonable interpretation is, that when a registered pharmacist is employed and placed in charge of a store of that character, although he is not the owner of it, the place does thereby become his place of business within the meaning of said Section 12.

The law makes it the duty of the owner to have in charge of his store a registered pharmacist. It is the corresponding duty

of the latter to take charge, if he accept the employment. Taking charge of the store in this instance means something more than nominal representation of the owner. He is the person who must decide and control as to the sale of drugs, medicines and poisons. The owner cannot pretend to put him in charge, and at the same time employ an unskilled person in the same store who is independent of him as to such sales. The registered pharmacist who enters upon the charge of such a store, upon such conditions, does so at his peril. Judgment of the Criminal Court affirmed.

Review of Haas v. People:

1. Give a brief statement of the facts.
2. What was the defense of Haas?
3. What was the intention of the Legislature in this particular act?
4. What is the duty of one who is hired to take charge of a drug store?
5. What is meant by being in charge of a drug store?

Assistant Pharmacist may Lawfully Take Charge

S. C. Laws 1925, p. 35, § 6

Statute: An assistant pharmacist may lawfully take charge of a drug store or pharmacy during the temporary absence of the registered pharmacist, but cannot own, conduct or operate a drug store or pharmacy unless he employs a registered pharmacist, and places him in active charge of all professional duties connected with the proper and lawful conduct of the business. The said board shall make rules and regulations clearly defining temporary absence.

Registered Pharmacist Being Absent from Store for Short Time

Case:

STATE v. LEVINE.

Supreme Court of Minnesota, 1928. 173 Minn. 322, 217 N. W. 342.

I. H. Levine was convicted of conducting a drug store without having a registered pharmacist or assistant pharmacist in charge at all times, and he appeals.

Defendant is a registered pharmacist, and owns and conducts a drug store in Minneapolis. Besides drugs, he has for sale magazines, tobacco, fine stationery, toilet articles, candies, ice

cream, and soft drinks. He was charged with violation of this statute :

"No person shall hereafter carry on, conduct, or transact business under a name which contains as a part thereof, the words, drugs, drug store, or pharmacy, or in any manner, by advertisement, circular, or poster, sign, or otherwise describe or refer to the place of business conducted by such person by the terms, drugs, drug store, or pharmacy, unless the place of business so conducted be at all times in charge of a registered pharmacist, or during the temporary absence of such registered pharmacist, in charge of a registered assistant pharmacist."

The defendant attacks the constitutionality of the part of this act above quoted, and also the court's action in excluding evidence tending to show that defendant, though not in the store during his meals, was in charge of the sale of drugs at all times, since he had arranged so that while at meals he could be called by telephone and would reach the store in a few minutes if any drug was desired, and that the clerk in charge sold or disposed of no drugs in his absence. The court ruled out such evidence as immaterial, holding that there was a violation of the statute if the store was kept open for any appreciable time without a registered pharmacist or a registered assistant being actually within the store and in charge thereof.

Question: Did the defendant in fact violate the statute?

HOLT, J. If possible, a statute should be so construed as not to offend or run counter to constitutional guaranties. It is also the duty of courts to so construe a law regulating a lawful business that unreasonable burdens and absurd restrictions be not imposed thereon. We must take notice of the fact that in the outskirts of our large cities, and in the numerous small villages over the state, drug stores are necessities, yet the sale of drugs is so small that no person could make a living therefrom unless side lines of ordinary merchandise were carried, and even then the profit would not provide for a registered assistant pharmacist to be in charge when the owner, a registered pharmacist, would step outside for meals or any other temporary errand of a few minutes. We take notice of the well-known fact that in villages business men often live over their stores, or in rear rooms, or within a block or two thereof, and it would be an unreasonable construction of the law to hold that a registered pharmacist owner violated this law, if while at his meals, he left one not a registered assistant pharmacist in charge of the store with instructions not to sell drugs and with facilities for

calling the owner pharmacist were drugs wanted or the filling of prescriptions required, and the one so left in charge disposed of no drugs meanwhile. Having in view that the sole purpose of section 5814 is to prohibit the dispensing of drugs by other than duly registered pharmacists and registered assistants, we think a proper construction to be that a registered pharmacist owner is at all times in charge while during short intervals of the day he is at his meals within easy reach and on call, and the one left in charge of the store does not undertake to sell any drug in his absence. So construed, the law is not open to any constitutional objection and its purpose is accomplished.

Review of State v. Levine:

1. What was the offense charged against Levine?
2. He was accused of having violated what statute?
3. What evidence was excluded on the trial?
4. How should statutes regulating lawful business be construed?
5. Of what facts did the court take notice?
6. What was the sole purpose of section 5814?
7. What was the proper construction of the act?
8. Why was the law not open to any constitutional objection?

Temporary Absence of Registered Pharmacist from Drug Store

The state of Florida has attempted to make clear any uncertainty which may have existed as to the conducting of a drug store during the temporary absence of a registered pharmacist. To this end the following regulation was passed and later explained by the state board of pharmacy:

(a) Florida Regulation on "Temporary Absence." "Temporary absence, during which a non-registered pharmacist may be left in charge of a drug store, shall be for not more than two hours at any one time, during which absence the prescription and poison departments shall be absolutely closed."

(b) "Temporary Absence" Construed by the State Board of Pharmacy. "The Board of Pharmacy construes the words, 'temporary absence' to mean that a registered pharmacist can only leave his store in charge of an assistant pharmacist when it is necessary for him to be absent on duties in connection with that business; that he can go out to meals, be out for an afternoon or evening, but he cannot go out on a vacation of two

weeks, nor can he engage in any other business, and put in an hour or two at his store unless he has in his employ a Registered Pharmacist who is in charge of the store. The expressed intention of the pharmacy law is to keep every drug store or pharmacy under the immediate charge and supervision of a Registered Pharmacist all the time the drug store or pharmacy is open for business."

Statute Cannot Permit Widow or Administrator of a Registered Pharmacist to Continue the Business

A Vermont statute made it unlawful for a person not licensed as a pharmacist to practice pharmacy or to expose for sale at retail any drugs, unless the business is conducted by a licensed pharmacist, and providing that this shall not apply to the widow or administrator of a registered pharmacist. In holding this clause invalid, the court said: "This exception may have had its origin in some idea regarding the necessity of a sale in the settlement of estates; but the provision is so sweeping that it authorizes unskilled persons to do, without limitation as to time or stock, everything that is prohibited to other owners of like property." *State v. Abraham* (1905) 78 Vt. 53, 61 A. 766.

Drug Stock Sold by Sheriff in Mortgage Foreclosure

It sometimes happens that the owner of a stock of drugs mortgages his goods. If he does not pay the debt, it may become necessary for the sheriff to sell the stock at auction to satisfy the debt. This happened in Iowa, where the statute read, "pharmacists, whose certificates of registration are in full force and effect, shall have the sole right to keep and sell under such regulations as have been established from time to time by the commissioners of pharmacy, all medicines and poisons." In *Cocke v. Montgomery* (see readings) it was held that the sheriff in conducting the sale was not violating the statute. This would necessarily have to be true if it were legal to borrow money on a stock of drugs. If the stock could not be sold at sheriff's sale, the effect would be to avoid all chattel mortgages on drug stocks. The view is that the statute does not apply to foreclosure sales.

Readings: Drug Stock Sold to Foreclose a Mortgage. Drug Stock Sold at Auction. *Cocke v. Montgomery* (1888) 75 Iowa, 259, 39 N. W. 386.

Michigan Law Requires Display of Certificate

Mich. Pub. Acts 1925, No. 58

Statute: Every person receiving a certificate or license under this act shall keep the same conspicuously exposed in his place of business, and every registered pharmacist or registered assistant pharmacist shall within ten days after changing his place of business or employment, as designated by his certificate, notify the board of his new place of business or employment. The board shall preserve and keep a record of all certificates issued by it, and such records shall at all times be open to inspection, as are other public records. (This statute is an example of the requirements of many states.)

Colorado Law Requiring Name of Proprietor to be on Sign of Drug Store

Colo. C. L. 1921, § 4592

Statute: Every person, partnership, association or corporation doing business as proprietor or proprietors of a place in which drugs and medicines or poisons are retailed or physicians' prescriptions are compounded or dispensed, shall cause the actual name of proprietor or proprietors to be displayed upon a sign which shall be conspicuously placed upon the exterior of the premises where such business is conducted. The name or names so displayed upon the sign shall be deemed presumptive evidence of the ownership of such pharmacy, drug store or business, and every such pharmacy, store or dispensary, shall after satisfying the board that same is conducted according to law, pay the sum of fifty (50) cents a year to the secretary of said board upon which the secretary shall register said pharmacy, store or dispensary, and furnish the proprietor or manager thereof with license.

Ownership of Drug Stores by Corporations

In 1927, a statute was passed in Pennsylvania requiring every pharmacy to be owned by licensed pharmacists, and, in case of corporations, associations, and copartnerships, requiring all partners or members to be licensed pharmacists, except as to those already engaged in such business. This statute was held invalid both by the Supreme Court of Pennsylvania and by the Supreme Court of the United States. Part of the decision follows:

"In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. No facts are presented by the record, and, so far as appears, none were presented to the Legislature which enacted the statute, that properly could give rise to a different conclusion. It is a matter of public notoriety that chain drug stores in great numbers, owned and operated by corporations, are to be found throughout the United States. They have been in operation for many years. We take judicial notice of the fact that the stock in these corporations is bought and sold upon the various stock exchanges of the country and, in the nature of things, must be held and owned to a large extent by persons who are not registered pharmacists. If detriment to the public health thereby has resulted or is threatened, some evidence of it ought to be forthcoming. None has been produced, and, so far as we are informed, either by the record or outside of it, none exists. The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment." *Liggett Co. v. Baldridge* (1928) 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204.

Restricting Ownership of Pharmacies

Digest of Case:

A state statute restricting ownership of pharmacies to licensed pharmacists held to be unconstitutional and void, as in contravention of the Fourteenth Amendment of the Federal Constitution. *Pratter v. Lascoff* (1931) 140 Misc. 211, 249 N. Y. S. 211.

CHAPTER 3

DEGREE OF CARE AND SKILL REQUIRED OF DRUGGISTS AND ASSISTANTS

Duty of Care and Skill a Druggist Owes His Customers

In the innumerable cases concerning physicians, surgeons, dentists, and pharmacists which have come before the courts for adjudication, the phrases, "due care and skill" and "ordinary care," are of frequent occurrence. The druggist naturally wants to know how these terms apply to him in the practice of his profession. In other classes of employment in which the risk to life and health of customers is less, the degree of care essential might not be so great and "ordinary care" might have a different significance. It is not easy to determine just how great a degree of care, skill, prudence, and vigilance will meet the requirements in filling a prescription, especially one containing poison where an error might result in grave or fatal consequences, but the law makes it clear that the care required must be commensurate with the danger involved. In *Smith v. Middleton* (see readings) it is stated that it is incumbent upon a druggist to exercise that high degree of care and caution called for by the peculiarly dangerous nature of his business. In another case, Justice Robb presents the essentials thus: "All the authorities agree, and the very necessities of the case require, that the highest degree of care known to practical men must be used to prevent injuries from the use of drugs and poisons. It is for these reasons that a druggist is held to a special degree of responsibility. The care required must be commensurate with the danger involved. The skill employed must correspond with the superior knowledge of the business which the law requires." Justice Robb, in *Knoefel v. Atkins* (1907) 40 Ind. App. 428, 81 N. E. 600.

Care and Skill Required of Druggists

Digest of Cases:

1. Customer in Store Injured by Explosion. A druggist injured a person in his store by the explosion of a mixture he was compounding. Held that the druggist was liable if he failed to exercise the utmost care to avoid the injury, where the mix-

ture was such that a well-educated druggist should reasonably suspect danger from an explosion. *Kerr v. Clason*, 2 Ohio Dec. 666, 4 West Law Month. 488.

2. Strychnine Used in a Prescription. Proof that a druggist used strychnine in a prescription when a preparation of camphor was called for is sufficient to show negligence, in the absence of satisfactory explanation. *Minner v. Scherpich* (1886) 5 N. Y. St. Rep. 851.

3. A druggist, in putting up a prescription is not an absolute insurer. He is required to exercise only ordinary care, though that care must be of a high character. *Faulkner v. Birch* (1905) 120 Ill. App. 281.

4. The degree of care and skill required of a druggist must be in proportion to the gravity of the injury that might result from want of care. *Beckwith v. Oatman*, 43 Hun, 265, 5 N. Y. St. Rep. 445.

5. Duty of Customer and Druggist. A druggist and his customer are not under the same degree of care in the furnishing and the taking of the drug. It is the duty of the druggist to exercise the highest degree of care for the safety of the public dealing with him, while the customer is bound only to exercise ordinary care for his own safety. *Sutton's Adm'r v. Wood* (1905) 120 Ky. 23, 85 S. W. 201, 27 Ky. Law Rep. 412, 8 Ann. Cas. 894.

6. Ordinary Care. "Ordinary care" with reference to the business of a druggist must therefore be held to signify the highest practicable degree of prudence, thoughtfulness, and vigilance and the most exact and reliable safeguards consistent with the reasonable conduct of the business in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicine. *Tremblay v. Kimball* (1910) 107 Me. 53, 77 A. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C, 1215.

7. Prima Facie Negligence. Where a customer calls upon a druggist for a harmless remedy, the delivery of a poisonous drug by mistake by the druggist or his clerk is prima facie negligence, placing the burden on him to show the mistake was, under the circumstances, consistent with the exercise of due care. *Knoefel v. Atkins* (1907) 40 Ind. App. 428, 81 N. E. 600.

8. Doctrine *Res Ipsa Loquitur*. The principle *res ipsa loquitur* should be applied on proof of sale by mistake of citric acid instead of epsom salts. *Edelstein v. Cook* (1923) 108 Ohio St. 346, 140 N. E. 765, 31 A. L. R. 1333.

Degree of Care, Skill, and Knowledge Required of Druggists*Readings:*

1. Highest Practicable Degree of Prudence. *Tombari v. Connors* (1912) 85 Conn. 231, 82 A. 640, 39 L. R. A. (N. S.) 274.
2. Gross Negligence. *Smith's Adm'x v. Middleton* (1902) 112 Ky. 588, 66 S. W. 388, 23 Ky. Law Rep. 2010, 56 L. R. A. 484, 99 Am. St. Rep. 308.
3. Highest Degree of Care Known. *Walton v. Booth* (1882) 34 La. Ann. 913.
4. Care and Skill in Filling Prescriptions. *Tremblay v. Kimball* (1910) 107 Me. 53, 77 A. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C, 1215.
5. Degree of Care Commensurate with Danger. *Highland Pharmacy v. White* (1926) 144 Va. 106, 131 S. E. 198, 44 A. L. R. 1478.

Rule of Caveat Emptor in Sale of Drugs

The rule of *caveat emptor* is that "the purchaser must beware," and signifies that it is the duty of the buyer to protect himself by being on his guard in the purchase of chattels, especially by making an examination to ascertain the kind and quality of goods he is purchasing. The rule of *caveat emptor* has no application to the sale of drugs or poisons, either at retail or wholesale, because the ordinary purchaser of a drug or poison could not identify with precision the article called for. This amounts to saying that there is a warranty by the druggist that the drug delivered is the one called for by the customer. This makes the business of a druggist a responsible one, especially when handling drugs to be taken internally.

The Rule of Caveat Emptor as Applied to Sale of Drugs*Case:***JONES v. GEORGE.**

Supreme Court of Texas, 1882. 56 Tex. 149, 42 Am. Rep. 689.

An action for breach of warranty. The plaintiff called for "Paris green" for destroying cotton worms, and was given a different article by the druggist, which was worthless as a worm destroyer.

Question: Does the rule of *caveat emptor* apply?

WATTS, J. It is claimed that in the sale of chattels, where the purchaser has an opportunity to examine before the purchase is made, the common law rule of *caveat emptor* applies without exception. As a general rule, the doctrine does apply in the purchase of chattels, when an opportunity for examination by the purchaser is shown. But where from the nature of the article, or the peculiar character of the business in which the same is being sold, it is shown that an examination would not avail the purchaser anything, it might constitute an exception to the general rule, dependent upon the circumstances of each particular case. The appellee was engaged in the business of a druggist, holding himself out to the public as one having the peculiar learning and skill necessary to a safe and proper conducting of the business. The general customer is not supposed to be skilled in the matter, and as represented in this case, does not know one drug from another, but in the purchase of drugs, the customer must rely upon the druggist to furnish the article called for and in this particular business, the customer who has not the experience and learning necessary to a proper vending of drugs would not be held to the rule that he must examine for himself. It would be but idle mockery for the customer to make the examination when it would avail him nothing.

On the contrary, the business is such that in the very nature of things the druggist must be held to warrant that he will deliver the drug called for and purchased by the customer. If as claimed, the appellee delivered to appellant some harmless or useless drug instead of the Paris green, asked for by appellant, he would be held liable for the damages resulting from the act as a natural or legal consequence. [*Caveat emptor* does not apply.]

Review of Jones v. George:

1. What was the object of the action?
2. Did the customer call for a specific drug for a specific purpose?
3. What is the rule of *caveat emptor*?
4. Why should the rule of *caveat emptor* apply to the purchase of chattels and not to the purchase of drugs?
5. To what extent does the inexperience of the customer cast an additional liability on the druggist?
6. Why should the customer be permitted to rely upon the druggist to furnish the drug demanded?

7. Why should the druggist be held to warrant that he delivered the drug demanded by the customer?
8. What liability attaches to a warranty of this kind?

Implied Warranties of a Druggist

As has been stated in a number of places, the position of a druggist is one of great responsibility. Purchasers of drugs are usually ignorant of the substances bought and of their qualities and reactions. For this reason any carelessness on the part of the druggist might be the cause of great suffering or death. The very fact that a druggist assumes to act in that capacity carries with it an implied warranty of the quality of the drug sold, that it is the kind called for, and, if he undertakes to fill the prescription or to compound medicines, that he has the ordinary skill of a druggist, and that he will exercise due and proper care.

Readings: Warranties of a Druggist on the Sale of Drugs.

1. Paris Green for a Crop. *Jones v. George* (1884) 61 Tex. 345, 48 Am. Rep. 280.
2. Warranty of a Druggist Who Buys in Bulk and Bottles a Drug, Placing His Label on It. *Highland Pharmacy v. White* (1926) 144 Va. 106, 131 S. E. 198, 44 A. L. R. 1478.

Lack of Care in Arranging Drugs on Shelves

It is essential that great care be exercised in the arrangement of drugs. If drugs are placed on the shelves in a haphazard manner, accidents are almost sure to happen. In *Tremblay v. Kimball*, 107 Me. 53, 77 A. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C, 1215, a customer received a verdict for \$1,400 for an alleged failure of duty on the part of a registered pharmacist, employed in a drug store, for an injury caused by the improper filling of a prescription. The drug clerk contended that the mistake was due to the fact one of this employers had placed two bottles side by side marked "chlorodyne tablets," one of which, however, contained the poisonous tablets in question, and that these tablets so closely resembled each other that it was not negligence on his part to fill the prescription as he did. Notwithstanding these facts, the verdict was against the clerk, as stated above.

Defense that Defendant was a Careful and Prudent Man in the Handling of Drugs and Medicines

Case:

HALL, v. RANKIN.

Supreme Court of Iowa, 1893. 87 Iowa, 261. 54 N. W. 217.

Action to recover damages of the defendant, a druggist, for selling and putting up carbolic acid instead of spirits of niter, by reason of which mistake the acid was given to plaintiff's mare, causing her death. Plaintiff claims that in April, 1890, he purchased of the defendant, a registered pharmacist, two ounces of spirits of niter; that the defendant carelessly and negligently gave him instead two ounces of carbolic acid, in a bottle labeled "Spirits of Niter"; that, relying upon the proficiency of the defendant as a pharmacist, and without negligence on his own part, he administered to his mare a part of the contents of said bottle, from the effects of which she died.

Question: In an action for damages against a druggist for alleged neglect in the sale of drugs, is it a defense that he was a careful and prudent man in the handling of drugs and poisons?

KINNE, J. Defendant offered to show by several witnesses that he was a careful and prudent man in handling medicines and poisons. The court rejected the testimony, and its action is assigned as error. The question here presented is the same, in principle, as in the case of *Stone v. Insurance Co.*, 68 Iowa, 737, 28 N. W. 47, 56 Am. Rep. 870, where it was held that in a civil action, evidence of the good character of one charged with burning his insured property was inadmissible. We are satisfied with the rule as established in that cause. The proposed evidence was properly rejected.

Review of Hall v. Rankin:

1. What is the principal point of law in this case?
2. What was the purpose of the action?
3. What mistake was charged to the druggist?
4. Did the plaintiff claim that the defendant was careless?
5. Why did the plaintiff allege that he was free from negligence?
6. What defense did the druggist make?

7. Why was the evidence of the defendant rejected?
8. What is a civil action?
9. The court compared this case to what other case?
10. Why are they similar?

Pharmacopœia

The word "pharmacopœia" has been in use for centuries as the name of a book containing directions for the identification of simples and the preparation of compound medicines. In the beginning such compendiums were issued by private individuals, but eventually were published by governmental authority or by a pharmaceutical society. The first pharmacopœia published by government authority was that of Nuremberg in 1542. The first authorized London pharmacopœia, published in 1618, contained prescriptions and formulas which, in the light of later knowledge, appear utterly ridiculous. From time to time improvements were made, until in 1788 an edition appeared which eliminated many of the useless simples and the more complex medical recipes which had been in use for 2,000 years.

National pharmacopœiæ have been brought out by governmental authority in most of the European countries as well as in India, Japan, some of the South American countries and Mexico.

In the United States, the British Pharmacopœia was used until 1820, when, authorized by the medical societies of the country, a United States National Pharmacopœia was published in both Latin and English. From time to time this has been revised and brought down to date. For years a need was felt for a National Formulary as an adjunct to the United States Pharmacopœia, and finally, in 1888, the first edition of the National Formulary of Unofficial Preparations was published. Since that time a number of revised and enlarged editions of the National Formulary have been put out.

Pharmacopœia and National Formulary

Many states provide that there shall be kept in every drug store a copy of the latest revision of the United States Pharmacopœia and the National Formulary, which books shall be subject at all times to the inspection of the pharmacy examiner, and that the standard of purity of all drugs shall be the United States Pharmacopœia and the National Formulary.

Pharmacopœia and National Formulary

Iowa Code 1904, § 3150

Statute: There shall be kept in every place in which drugs or medicines are compounded, a copy of the latest revision of the United States Pharmacopœia and the National Formulary, which books shall be subject at all times to the inspection of the pharmacy examiners.

Review of Iowa Statute:

1. Describe the uses of the United States Pharmacopœia.
2. By whom and how often is this book prepared?
3. State the purposes of the National Formulary.
4. Under whose direction is it prepared?
5. Why should a copy of each be kept in drug stores?
6. Why should they be subject to inspection?

Automatic Vending Machines for Drugs

In these days when automatic vending machines are in use for the sale of many articles it is not unexpected to find attempts being made to dispense certain drugs in this manner. As yet but little litigation on this subject has come before the courts in this country, but the English courts have already taken cognizance of it. Oregon has recently passed a statute which shows the trend of the law in this respect.

Oregon Forbids Use of Automatic Vending Machines for Drugs

Or. Laws 1933, c. 154

Statute: Section 1. That for the purpose of this act the term "drugs" shall include all medicine and preparations recognized in the United States pharmacopœia or national formulary for internal or external use, and any substance or mixture of substances intended to be used for the cure, mitigation or prevention of disease of either man or animals.

Section 2. The term "automatic vending machine" shall be construed to mean any mechanical device or contrivance, whereby the purchaser is able to secure drugs, as hereinbefore defined, without the aid or assistance of another party.

Section 3. That hereafter no drugs, as hereinbefore defined, shall be dispensed to the public by means of automatic vending machines.

Section 4. Any person, or persons, violating this act shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than one hundred dollars (\$100), or imprisonment in the county jail for not more than ninety (90) days, or by both such fine and imprisonment, in the discretion of the court.

Automatic Vending Machines for Drugs in England

In England, the defendant, a duly registered chemist and druggist, sold and offered for sale lysol, a poison, from an automatic machine which he had placed just outside the door of his shop. The court held that the sale by means of the automatic machine was not an offense under the Poisons and Pharmacy Act, and that the business carried on by means of the automatic machine was bona fide conducted by the pharmacist himself. This was merely an interpretation of the English statute. *Pharmaceutical Society v. Watkins*, Eng. 1931, 2 King's Bench Division 323, 75 Sol. J. 286-287, 95 Just. P. 282, 287, 74 Sol. J. 608.

CHAPTER 4

PRESCRIPTIONS

Pennsylvania Statute Defines "Prescription"

35 PS § 853

Statute: The word "prescription" shall be construed to designate a written order, by a duly licensed physician, dentist or veterinarian, calling for a drug, or for any substance or preparation containing a drug.

Prescription—Statutory Regulations

It is within the power of the legislatures of the states to pass laws concerning prescriptions in the hands of druggists. Statutes may require that all prescriptions filled be kept, numbered, and filed, so as to be available for use of courts and grand juries.

Language of Prescriptions

Okl. St. 1931, § 4714

Statute: No practicing physician or surgeon shall write or cause to be written any prescription or recipe in any characters, figures or ciphers other than in the English or Latin language, generally in use among medical practitioners; and for every violation hereof the offender shall forfeit not less than five nor more than twenty-five dollars.

Purpose of This Type of Statute

Sometimes physicians, in return for a share of the profits, direct all of their prescriptions to a particular drug store, and, in order to prevent them from being compounded by other druggists, write them in terms which only the druggist with whom he has the agreement can understand. The object of the Oklahoma statute is to prevent such unfair and unethical practices.

Prescription—Possession and Ownership

When a person pays for a prescription, he naturally feels that it belongs to him. It has value to him in that he may wish to have it refilled in the future. The possession of the prescription

also has value to the druggist, since, in order to have it refilled, the customer must return to his place of business. To-day, in a number of states, there are statutes requiring the druggist to keep and file prescriptions filled in due course of business. Even apart from the statutes it has become a well-established custom of drug companies to retain prescriptions filled by them, so that a customer is charged with knowledge of this manner of transacting business. Except when the prescription calls for habit-forming drugs, intoxicating liquors, or abortifacients, druggists usually will give a copy of a prescription, when requested to do so by the person who brought it to be filled or by the prescribing physician. However, a druggist refusing to fill a prescription has no right to retain it, but should return it to the customer presenting it.

Original Prescription Filed for Five Years

Del. Rev. Code 1915, § 870

Statute: Every proprietor or manager of a drug store or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such store or pharmacy, and said book or file of original prescriptions shall at all times be open to inspection by duly authorized officers of the law. Nothing in this section shall be construed to relate to or affect section 142 of chapter 6 (Del. Rev. Code 1915, § 179), relating to the sale of intoxicating liquors.

Prescription or a Copy shall be Filed and Preserved

N. C. C. S. § 6666

Statute: Every proprietor or manager of a drug store or pharmacy shall keep in his place of business a suitable book or file, in which shall be preserved for a period of not less than five years the original of every prescription compounded or dispensed at such drugstore or pharmacy. Upon the request of the prescribing physician, or of the person for whom such prescription was compounded or dispensed, the proprietor or manager of such drugstore or pharmacy shall furnish a true and correct copy of such prescription, and said book or file of original prescriptions shall at all times be open to the inspection and examinations of duly authorized officers of the law or other persons authorized and directed by the Board of Pharmacy to make such inspection and examination.

Readings: Ownership and Possession of Prescriptions.

1. Ownership of X-Ray Plates. 95 Central Law Journal, 133.
2. Prescriptions Kept by a Druggist' Not Private Papers. *State v. Davis* (1891) 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640.
3. Prescriptions for Intoxicating Liquors. *State v. Pence* (1909) 173 Ind. 99, 89 N. E. 488, 25 L. R. A. (N. S.) 818, 140 Am. St. Rep. 240, 20 Ann. Cas. 1180.
4. Who Owns the Prescription? 25 Law Notes, 224; 8 Va. Law Reg. N. S. 470.
5. Statute Requires Druggists to Preserve Prescriptions. *State v. Bragg* (1892) 51 Mo. App. 334.
6. Customer Depositing Prescription with a Druggist has a Qualified Right to Use It if Asserted. *Stuart Drug Co. v. Hirsch* (Tex. Civ. App. 1899) 50 S. W. 583.

Negligence in Filling Prescriptions

To an outsider it would appear that the one great duty of the pharmacist is involved in filling prescriptions, and that his entire professional education has been to prepare him for just that line of service, and consequently errors and mistakes should be very few. But, with all the preparation and education, mistakes do happen and injury results therefrom, and litigation arises. In almost every case it is a question of negligence, causing liability. The general rule has been stated that, if in filling a prescription a druggist is negligent and injury thereby results, he is liable unless contributory negligence of the injured party, or some other defense, intervenes to relieve the druggist.

Negligence in Failure Properly to Mix the Drugs

*Case:***COUGHLIN v. BRADBURY.**

Supreme Judicial Court of Maine, 1912. 109 Me. 571, 85 A. 204.

These are actions against the defendant for alleged negligence in compounding a physician's prescription, calling for 5 grains of phenacetin and 5 grains of sugar of milk, to be put up in the form of five powders, containing one grain each of the phenacetin and sugar of milk. About a year before the use of the drug upon which the case arose, the plaintiff, John Coughlin, procur-

ed a prescription from Dr. Cochrane for the compound above described. It had been refilled three or four times, and administered two or three times before to the little girl, Helen, 4 years old. When one of these last-obtained powders was given to her, it made her quite seriously ill, from the effects of which she suffered some weeks. There is only one ground upon which the defendant can be charged with negligence, and that is a failure to properly mix the ingredients of which the compound was made, so as to distribute the phenacetin throughout the mixture so that substantially one grain was contained in each powder.

Question: Was the druggist negligent?

PER CURIAM. It is not in controversy that the defendant pursued the usual course in filling this kind of a prescription. He weighed out five grains of each of the required ingredients, placed them in a mortar, stirred them with a pestle "from a minute and a half to two minutes," dumped the mixture upon a prepared paper, graded it up as near as possible, divided it into five equal parts, and then placed them into separate papers and folded them for use, properly marking the box in which they were contained. The evidence shows that this was the appropriate and usual method of filling this kind of a prescription.

Unfortunately, one of these powders was analyzed, and the inference to be drawn from this analysis is rather against the supposition of due care. The powder analyzed should have contained one grain of phenacetin, whereas it did contain but six-tenths of a grain, or one-tenth more than half. The surplus, consequently, must have gone into one or have been distributed in all the other powders. The other powders may also have been so unevenly mixed as to have enabled some one powder to have contained a very much larger proportion of the medicinal elements than was intended, and therefore have become an overdose for a child but four years of age.

It was incumbent upon the defendant either to so thoroughly mix the ingredients that each powder would contain substantially the quantity it was intended to have, or to compound each powder separately by weight, which was perfectly practicable to do.

Review of Coughlin v. Bradbury:

1. The prescription called for what ingredients?
2. What negligence is attributed to the druggist?
3. Is it customary to use the same prescription many times?

4. Why was the defendant held to be negligent if he pursued the usual course in filling such prescriptions?
5. Is it a safe method to fill such prescriptions?
6. What duty is imposed on a druggist in compounding this type of prescriptions?

Readings: Errors and Mistakes in Compounding Prescriptions.

1. Error in Filling a Prescription. Tremblay v. Kimball (1910) 107 Me. 53, 77 A. 405, 29 L. R. A. (N. S.) 900, Ann. Cas. 1912C, 1215.
2. Citric Acid Instead of Epsom Salts. Edelstein v. Cook (1923) 108 Ohio St. 346, 140 N. E. 765, 31 A. L. R. 1333.

Prescription and the "Best Evidence" Rule

It is a rule of evidence that the highest degree of proof possible in the nature of the case must be produced, and that no evidence shall be received which indicates that the party offering it can secure better evidence. If a transaction has been based upon a writing, that writing constitutes the best evidence. If the writing is not produced at the trial, it must be accounted for before parol evidence of its contents can be introduced.

That a prescription is best evidence as to its contents is declared in the following opinion: "The prescription Dr. McCann was interrogated about was the best evidence of what it called for. Had it been introduced in evidence, Dr. McCann might have interpreted it to the jury, if that had been necessary in order to enable them to understand it. No proper predicate was laid for the introduction of secondary evidence, and the court did not err in declining to allow the doctor to read to the jury what he claimed was a copy of the alleged prescription. It appears that the prescription was in a drug store in the city of Columbus, in the state of Georgia. The trial of this defendant occurred in Russell County, Alabama, just across the river from the aforementioned city. The fact that the prescription was in an adjoining state did not render the secondary evidence of its contents admissible. It does not appear that any effort was made to obtain the written prescription by deposition, nor was it shown that it could not have been obtained by that means, had the appellant attempted so to do." Bricken, P. J., in *Humber v. State* (1926) 21 Ala. App. 378, 108 So. 646.

Review of Humber v. State:

1. Explain the "best evidence" rule.
2. What, in this case, is meant by "evidence"?
3. What is parol evidence?
4. What is meant by introducing a prescription in evidence?
5. What is secondary evidence?
6. Why was the doctor not allowed to read the contents of a copy of the prescription in evidence?
7. When is secondary evidence admissible concerning the contents of a prescription?
8. For what purposes would it be advantageous to question the doctor about a prescription?
9. Would the trial be delayed by a mistake of this kind in the procedure?

Prescriptions—Both Druggist and Physician may Make a Mistake

A prescription was improperly written by a physician, as a result of which the child to whom the medicine was given died. The physician when sued for malpractice pleaded that the druggist also was negligent in filling the prescription, and that the prescription had been taken to a drug store other than the one selected by the physician. These were not valid defenses. At most, the negligence of the druggist concurred with that of the physician in producing the injury, which did not relieve the physician from liability for his act of negligence. The owner of a prescription may select his druggist, unless restricted by agreement or otherwise. *Murdock v. Walker* (1892) 43 Ill. App. 590.

Refusal to Fill a Prescription

The mere refusal of a druggist to fill a prescription does not make him liable to either the customer or the physician. He may have some good reason for refusing to fill it. Being a chemist, he may suspect that some error has been made; he may not have the proper ingredients; he may doubt his own ability to fill that particular prescription; or he may fear that the filling of it may be in violation of some federal, state, or local law. The druggist must be careful not to make remarks concerning the physician or his prescription that reflect on the physician or his professional skill, for, if he does, he makes himself liable to a damage suit for slander. The law guards the

reputation of a professional man, in relation to his profession, zealously.

Druggist May Have Just Cause to Refuse to Fill a Prescription

Case:

TARLETON v. LAGARDE.

Supreme Court of Louisiana, 1894. 46 La. Ann. 1368, 16 So. 180, 26 L. R. A. 325, 49 Am. St. Rep. 353.

The plaintiff, a physician, claims of the defendant, a druggist, damages for his refusal to fill plaintiff's prescription and for slander. The defense is that defendant was unable to fill the prescriptions and a denial of the slander imputed to defendant. From the judgment of \$50 against him, defendant appeals, and, answering the appeal, plaintiff asks that the damages awarded be increased.

It appears from the record the defendant did decline to prepare two prescriptions of the plaintiff. In one a patent medicine formed a component part. The defendant seems to have been averse to putting up prescriptions of which the patent medicine formed a part. In his own language as a witness, he was unwilling to take the responsibility of such a prescription. With reference to the other prescription, the plaintiff's brief claims defendant should be made liable because of his refusal to fill it, avowed in his answer. But the answer is that the prescription was not filled for want of the necessary ingredients and other causes.

Question: Is a druggist liable simply because he refuses to fill a prescription?

MILLER, J. Not liable. In many cases the druggist may have the best reasons for declining to fill prescriptions. As a chemist he may perceive or have cause to suspect the physician erred in his prescription; or the druggist may not have at hand the ingredients; or he may distrust his ability to prepare the prescription, or other causes may disincline the druggist to undertake filling the prescription presented to him. Recognizing the room for all such causes, we cannot hold that the mere refusal of a druggist to fill prescriptions furnishes any occasion to hold him for damages to the physician who gives the prescription. It does not appear from the testimony that in refusing to

fill the prescription the defendant used any language derogatory to the plaintiff.

Review of Tarleton v. Lagarde.

1. Why did the physician sue for damages?
2. What defense was pleaded?
3. Why did the druggist refuse to fill the prescriptions?
4. State the question involved.
5. What reasons may a druggist have for refusing to fill a prescription?
6. Why might a druggist be unwilling to use a patent medicine as an ingredient in filling a prescription?
7. Why should a druggist be careful not to make unnecessary remarks about the physician or his prescription?

Illegible Prescription

A prescription may be so poorly written as to be illegible to a druggist, or, if he is able to read it, the directions may seem to him uncertain or incomplete. Under such circumstances he should refuse to fill it. Should injury result from the filling of such a prescription, the druggist might have difficulty in proving its illegibility, as other persons might be able to read the prescription even though he could not do so.

In *Tombari v. Connors* (see readings) are these words: "The defendant contends that the prescription was written in Latin, illegible, and doubtful as to what drug was really intended. Assuming this to be true, it would not lessen the duty of the clerk to be alert to avoid a mistake. If there was any reasonable doubt as to the identical thing ordered, the defendant's clerk should have taken all reasonable precaution to be certain that he did not sell one thing when another had been called for."

Illegible Prescriptions

Digest of Cases:

1. A druggist is not bound to fill any and all prescriptions; and his legal duty to a purchaser goes further than merely to dispense the identical substance which a prescription calls for, since as a chemist he may know that the physician has erred in his prescription and that to fill it might cause death or serious injury to the patient. *Jones v. Walgreen Co.* (1932) 265 Ill. App. 308.

2. A druggist was held not liable for failure to make inquiry of the physician regarding a prescription calling for poison, where it was shown that, had inquiry been made, the physician would have confirmed his prescription. *People's Service Drug Stores, Inc., v. Somerville* (1932) 161 Md. 662, 158 A. 12, 80 A. L. R. 449.

3. If a prescription is doubtful as to what drug is really intended, it is the duty of the pharmacist to be alert to avoid a mistake, and, if there is any reasonable doubt as to the identical thing ordered, it is his duty to take all reasonable precautions to be certain that he does not sell one thing when another is called for. *Jones v. Walgreen Co.* (1932) 265 Ill. App. 308.

Readings: Duty of Druggist in Filling Illegible Prescription.

1. *Tombari v. Connors* (1912) 85 Conn. 231, 82 A. 640, 39 L. R. A. (N. S.) 274.
2. Injury may Result though Druggist Exercised Due Care. *McClardy's Adm'r v. Chandler*, 3 Ohio Dec. (Reprint) 1.

Prescriptions in Court as Admissions

The records required by law to be made or kept by druggists selling liquor in prohibition territory have frequently been held admissible in evidence against a druggist in support of the charge of selling liquor unlawfully. Many of the old liquor statutes used to require a register to be kept by a druggist of his sales of liquor which should be at all times open to the inspection of certain specified officers. The druggist's reports of sales made by him are admissible in evidence against him as his admission, and it is not necessary that it should be first shown that the sales were unlawful. They are competent evidence to be considered in the light of other testimony to prove the illegal nature of the business.

Since the old liquor laws are gone, it might seem that this subject is unnecessarily included in this text, but it seemed well to retain it, as a similar statute in regard to drugs and narcotics generally would receive similar treatment at the hands of the courts.

Readings: Register of Sales of Liquor as Evidence in Court against Druggist.

1. Theory that They are Public Records. *State v. Smith* (1888) 74 Iowa, 580, 38 N. W. 492.

2. They are Public Papers, and Druggist is Merely Custodian. *State v. Davis* (1886) 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640.
3. Statute Gave Right to Certain Officers to Inspect Records. *Commonwealth v. Stevens* (1895) 155 Mass. 291, 29 N. E. 508.
4. Record of Sales of Liquor Made by Druggist as Evidence against Him. *State v. Pence* (1909) 173 Ind. 99, 89 N. E. 488, 25 L. R. A. (N. S.) 818, 140 Am. St. Rep. 240, 20 Ann. Cas. 1180.

Forgery of a Prescription for a Habit-Forming Narcotic Drug

Case:

PEOPLE v. BROWN.

District Court of Appeal, Second District, Division 2, California, 1931.
113 Cal. App. 492, 298 P. 503.

The defendant was convicted of forgery of a prescription, and appealed on the ground that a prescription for poisonous or narcotic drug is not the subject of forgery; there being no intent to defraud any particular person by obtaining the narcotic by the false writing.

Question: Can there be a forgery of a prescription?

IRA F. THOMPSON, J. The argument of appellant proceeds upon the assumption that there is no one to be defrauded by the prescription, and that, in the absence of an intent to defraud, there can be no forgery. The assumption, however, is false. We are all cognizant of the fearful consequences which would attend the unregulated sale of poisons and narcotics and conscious of the vital interest of the state in a strict supervision thereof. Contemplating, as we may and ought to do, the crimes committed with diabolical cunning and sometimes with fiendish cruelty, partly to satisfy the depraved appetite and partly to satiate or excite a disordered mind, we must conclude that any illegitimate and unlawful use of the habit-forming drugs is an injury to and a fraud upon the public as a whole—the state. We have been so prone to think of forgery as defined and denounced in our Penal Code (section 470 et seq.) as being an act designed to injure a particular individual or set of individuals that it is not surprising that the appellant has indulged the falla-

cious assumption. However, we find pertinent language in volume 2, Bishop's New Criminal Law, § 531, as follows: "If forgery when prejudicial to an individual is indictable, a fortiori it may be when tending to the harm of many or the public. Indeed, this is the kind of common law forgery mostly spoken of in the older books." The author then lists among the examples the alteration of a matter of record "or any other authentic matter of a public nature." We entertain no doubt whatever that a prescription for a poisonous or narcotic drug is the subject of forgery. The intent to defraud is unmistakably made manifest by the act of obtaining the narcotic by means of the false writing. It is alleged that the forged prescription was made use of for that purpose and the drug obtained thereby.

Review of People v. Brown:

1. The defendant had been convicted of what crime?
2. What is the question involved in the case?
3. What arguments were presented by the accused?
4. Why were his assumptions false?
5. Why was his crime a fraud upon the public?
6. How did the Penal Code define forgery?
7. State Bishop's definition of forgery.

Altering, Forging, or Counterfeiting a Prescription

Md. Code Pub. Gen. Laws 1924, art. 27, § 65

Statute: If any person shall falsely make, alter, forge or counterfeit, or cause or procure to be falsely made, altered, forged or counterfeited, or shall willingly aid or assist in falsely making, altering, forging, or counterfeiting or shall utter or pass, knowing it to be falsely made, altered, forged or counterfeited, any order, paper, letter writing, prescription, recipe or other device purporting to have been made by a regular practicing physician, for any drugs, medicines, spirituous or fermented liquors, he shall be deemed guilty of a misdemeanor, and on conviction in any court in this State shall be sentenced to the jail, the house of correction or penitentiary, for not less than six months nor more than two years, in the discretion of the court. If upon trial of any person charged with, or indicted for such misdemeanor, it shall appear that he paid for, or offered or promised to pay for, the drugs, medicine, spirituous liquor or fermented liquor obtained by means of such falsely made, altered, forged, or counterfeited order, paper, letter writing, pre-

scription, recipe or other device purporting to have been made by a regular practicing physician, he shall not by reason thereof be acquitted of such misdemeanor.

Prescriptions Given Over the Telephone

That great liability is involved in giving a prescription over the telephone is illustrated in the recent Vermont case of *Twombly v. Piette*, 99 Vt. 499, 134 A. 700. Mrs. Twombly called a physician over the telephone and told him that her daughter had had mosquito bites on her head and had accidentally combed through them, so that they were causing her trouble, and asked him if he could send something to put on to heal and stop them. The doctor said he would send some white powder over on the 5 o'clock train to be used. The powder arrived, was used, and caused great injury. The doctor telephoned a druggist, intending, no doubt, as the evidence showed, to order "mild chloride of mercury," but a mistake was made somewhere, and "bichloride of mercury" was delivered. A case of this kind involves both the doctor and the druggist, and liability will attach to the one who has made the mistake. All the business having been transacted over the telephone, it was difficult to determine who had made the mistake, but in this case recovery was had against the doctor. Situations in which the telephone was not used, but the prescription was written, have arisen in which both druggist and physician were negligent. The law under such circumstances was recently set forth as follows: "Of course, if a druggist is negligent in filling a prescription, he cannot escape liability because the doctor who wrote the prescription is also liable. But it does not follow because a physician in a given case is liable, that the druggist who filled the prescription is also liable." *People's Service Drug Stores, Inc., v. Somerville* (1932) 161 Md. 662, 158 A. 12, 80 A. L. R. 449. Under the Federal Anti-Narcotic Act (26 USCA §§ 211, 691-707), the giving over the telephone of prescriptions for certain drugs is unlawful.

Prescriptions—Druggist and Physician Should Co-operate

A druggist is in a business of many hazards, and is entitled to the co-operation of physicians. Recently, a druggist of wide experience commented on the attitude of physicians toward prescriptions brought in to be filled. A prescription appeared dangerous to the druggist, and he called the physician by tele-

phone, who asked to have the prescription read to him, and then informed the druggist that the prescription was correct, and asked him to fill it with care, and, in the future, to please call him in relation to prescriptions about which there might be any question. Under a similar situation, another physician became angry, saying that, if the prescription was his, it was correct, and, if the druggist cared for his business in the future, not to question his ability to write prescriptions again.

Druggist Refused to Deliver the Medicine but Retained the Prescription

Case:

WHITE v. McCOMB CITY DRUG STORE.

Supreme Court of Mississippi, 1905. 86 Miss. 498, 38 So. 739,
4 Ann. Cas. 518.

The plaintiff alleged that he was taken violently ill and called a physician, who prescribed for him to relieve him of his suffering, and he immediately sent the prescription to defendants to have it filled; that it was received by the defendants, but they willfully, negligently, and oppressively refused and failed to fill it, claiming that the plaintiff owed them; that plaintiff, when this was reported to him, sent a messenger to demand the prescription to have it filled by others, but defendants refused and neglected to deliver to plaintiff said prescription, which was his property and for which he had paid, and retained same in their possession without right; that plaintiff was thus forced to send for the physician again and get another prescription, and had to wait six hours to get the physician; that plaintiff was caused by the said wrongful acts of defendant, to suffer great pain, both mental and physical, and had to pay an additional sum of \$2.50 for another prescription.

Question: If a druggist refuses to fill a prescription has he any right to retain it?

Cox, J. The gravamen of the declaration, as we read it, is the action of defendants in willfully, knowingly, and oppressively, and in total disregard of plaintiff's rights, refusing to deliver to plaintiff his prescription, after having willfully and oppressively refused to fill the same, claiming as the reason that plaintiff owed them a bill. If this be not a tort, both willful and

oppressive, it would be difficult to conceive of one. Plaintiff would be entitled, on the facts stated, to a judgment for such sum as a jury would find, under proper instructions as to the measure of damage. * * *

It may be that apothecaries, after filling a prescription and delivering the medicines, have the absolute right to retain the prescriptions as a record of their business. Upon this point we express no conclusive opinion, because it is not necessary to the determination of the case presented by this record. But we cannot assent to the proposition that an apothecary who has refused to deliver the medicines called for in the prescription, because the party presenting it is unable or unwilling to comply with his terms as to payment, can retain in his possession the prescription, against a demand for its return. So to hold would be to place the sick largely at the mercy of the apothecary, and to cause suffering, and maybe death, to the poor, in cases where a demand for a cash payment would not be complied with. The rule contended for on behalf of appellees is not necessary for their protection. When a prescription is presented, they can easily ascertain before compounding the medicines whether their terms as to payment will be complied with. If the medicines are not delivered, they can have no need of the prescription as record of their business or as an instrument of evidence. Having received a prescription, we think they should either deliver the medicines, or return the prescription.

Review of White v. McComb City Drug Store :

1. State the facts out of which the litigation arose.
2. What is the gravamen of the declaration?
3. What excuse was offered by the druggist for retaining the prescription?
4. On what particular point of law did the court refuse to express an opinion?
5. If the medicine is not delivered, why is the prescription not needed by the druggist?
6. Would it be improper for a druggist before filling a prescription to make inquiry as to the terms of payment?

Customer had Prescription Filled Several Times without Consulting a Physician

In a Maine case a question of contributory negligence was raised because the customer of the drug store had a prescription refilled several times without consulting the physician. A

powder compounded by the druggist according to a physician's prescription had been given by a mother to her 4 year old child several times with beneficial results. Finally, having again had the prescription refilled, she administered the mixture to her child with injurious results. The question raised was as to whether the mother was guilty of contributory negligence in not consulting a physician before giving the dose to the child. The court decided the mother was not guilty in these words: "It appears, however, that a powder, compounded from this same prescription, and presumed to be precisely like it, had previously been given to this little girl two or three times with perfect success. If this powder, when properly compounded, had several times been used with benefit, then the mother, we think, had a right to presume that a use of it again for a similar trouble, and it was similar, would effect a like result. She could not, therefore, be charged with negligence even if her course was not in harmony with the highest degree of prudence. She was required to exercise only that caution which an ordinarily careful person would have done under like circumstances." *Coughlin v. Bradbury* (1912) 109 Me. 571, 85 A. 294.

The Prescription did Not Disclose All Uses to be Made of the Drug

Case:

WATKINS v. JACOBS PHARMACY CO.

Court of Appeals of Georgia, 1933. 48 Ga. App. 38, 171 S. E. 830.

A doctor furnished a written prescription containing 1 per cent. of gentian violet, with written directions that it be used gently as a mouth wash three times daily. The doctor also advised the plaintiff to use the prescription in her eyes. The druggist, in filling the prescription, made a solution of 3 per cent. gentian violet, which was too strong for the eyes, and in consequence thereof her eyesight was destroyed.

Question: Does the fact that the prescription called for a 1 per cent. solution, to be used as a mouth wash, relieve the druggist from liability when he negligently furnished a stronger and more dangerous solution, which was used for an eye wash, and caused injury?

Held: We think not. * * * The principle of law is well settled that a druggist impliedly warrants that the article he sells is the article called for, and is liable for breach of such warranty for injury resulting in giving the purchaser the wrong article. * * * The legal doctrine *caveat emptor* should in cases of vendors of drugs be *caveat venditor*.

Review of Watkins v. Jacobs Pharmacy Co.:

1. Was the prescription in writing?
2. What mistake did the druggist make?
3. Should a prescription disclose all uses to be made of the drug?
4. What was the implied warranty of the druggist in this case?
5. To whom was the druggist liable?
6. What is the difference between *caveat emptor* and *caveat venditor*?

Prescriptions for Cocaine and Allied Drugs

N. C. C. S. § 6672

In nearly all of the states, statutes in reference to cocaine and other narcotics are plain and specific. In addition to the regulations of prescriptions generally, other requirements are specified by statute. A few of these requirements most commonly incorporated in the statutes are to the effect that such drugs may be sold on prescription only, that the prescription must be kept on file, usually for a period of five years, and that no such prescription may be refilled, nor may a copy of it be given to any one except when needed for court purposes.

The North Carolina statute embodies many of the usual provisions, and is quoted below:

"1. *Dispensing without Prescription Forbidden.* It shall be unlawful for any person, firm, or corporation to sell, furnish, or give away any cocaine, alpha or beta eucaine, novocaine, opium, morphine, heroin, codeine, or any salt or compound of the foregoing substances, or any preparation or compound containing any of the foregoing substances, or their salts or compounds, in greater quantity than is prescribed in the United States Pharmacopoeia, except upon the original written order or prescription of a lawfully licensed practitioner of medicine, dentistry, or veterinary medicine, which order or prescription shall be dated, and shall contain the name of the person for whom prescribed, or, if ordered by a practitioner of veterinary medicine, shall state

the kind of animal for which ordered, and shall be signed by the person giving the order or prescription.

"2. Limitation as to Form of Preparation and Amount Dispensed. In no case shall any person, firm, or corporation fill any prescription or order for cocaine, alpha or beta eucaine, novocaine, opium, morphine, heroin, codeine, or any salt or compound of any of the foregoing substances, or any preparation or compound containing any of the foregoing substances, or their salts or compounds, in flakes or crystals, but only in a solution, or ointment, which shall not contain over four per cent of the above named substances, or any of them, and no such order or prescription shall be for a greater quantity than one ounce of any such solution or ointment sold and dispensed in one-ounce bottles.

"3. Prescription Retained; Duplicates. Such written order or prescription shall be retained by the person, firm, or corporation who shall compound or dispense the article ordered or prescribed, and it shall not be again compounded or dispensed, except upon the written order of the original prescriber for each and every subsequent compounding or dispensing. No copy or duplicate of such written order or prescription shall be made or delivered to any person, but the original shall at all times be open to inspection by the prescriber and properly authorized officers of the law.

"4. When Section Inapplicable. The above provisions shall not apply to preparations containing opium, or its derivatives, and recommended and sold in good faith for diarrhoea, cholera, or coughs, each bottle or package of which is accompanied by specific directions for use, and a caution against habitual use; nor to the compound powder of ipecac and opium, commonly known as "Dover's powders"; and the above provisions shall not apply to sales at wholesale by jobbers, wholesalers, and manufacturers to retail druggists, or qualified physicians, or to each other, nor to sales at retail by druggists to regular practitioners of medicine, dentistry or veterinary medicine, nor to sales made to manufacturers of proprietary or pharmaceutical preparations, for use in the manufacture of such preparations, nor to sales to hospitals, colleges, or scientific institutions."

Uniform Narcotic Drug Act

The proposed Uniform State Narcotic Act was drafted and approved by the National Conference of Commissioners on Uniform State Laws at its annual conference in 1932. During the

year 1933 it was adopted in Florida, Nevada, New Jersey, and New York. It is planned to have the act presented to the legislatures of the various states. Narcotic control would be greatly simplified if the uniform law were in force in all the states. The entire act appears in the appendix.

Cocaine, Morphine, and Allied Drugs

Digest of Cases:

1. A statute prohibited druggists from selling cocaine except on a physician's prescription. A registered physician was also the proprietor of a drug store. Held, that he could not render lawful a sale of cocaine without a prescription by afterwards filling out a prescription covering it. The prescription must be made out and signed before the sale is made. *State v. Willis* (1908) 128 Mo. App. 214, 106 S. W. 584.

2. Administering Morphine by Hypodermic Syringe. Where a person, in violation of statute, administers, by means of a hypodermic syringe, morphine to another in such quantities as to cause death, he commits an unlawful act, and a conviction of involuntary manslaughter in the commission of an unlawful act would be authorized. It would be no defense that in the administration of the drug the intent was not to cause death, but to alleviate pain. *Silver v. State* (1913) 13 Ga. App. 722, 79 S. E. 919.

3. Merely to Write a Prescription. A physician who merely writes a prescription cannot be said to dispense the drug or article described in the prescription. *People v. Cohen* (1916) 94 Misc. 355, 157 N. Y. S. 591.

4. Defendant Admits Possession of Drug. If the accused admits possession of narcotics in a quantity forbidden by statute, it is no defense that they were acquired or procured from a physician, pharmacist, or other authorized person. *Arnote v. State* (1929) 42 Okl. Cr. 355, 276 P. 242.

5. A statute making it an offense to sell or in any way dispose of morphine is violated by furnishing without sale. *State v. Handy* (1918) 7 Boyce (30 Del.) 224, 105 A. 426.

6. One who, owning and having in his possession a compound of morphine, permits another to have or use it, disposes of it in contravention of the statute. *State v. Rothman* (1918) 7 Boyce (30 Del.) 226, 105 A. 427.

Readings: Cocaine, Morphine, and Allied Drugs.

1. Prescription must be Made in Good Faith. City of Chicago v. Brendecke (1920) 170 Ill. App. 25.
2. Possession of Narcotics is an Offense under the Statute. State v. Radford (1925) 135 Wash. 120, 236 P. 804.
3. By Statute a Physician may Prescribe but Not Furnish Certain Narcotic Drugs. State v. Whipple, 143 Minn. 403, 173 N. W. 801.

Prescriptions Brought into Court by Legal Process

By the proper process a witness can be compelled to bring to court books, papers, or documents in his possession pertinent to the controversy being litigated, or which may contain material evidence. The writ which applies to written or printed matter is called subpoena *duces tecum*. A prescription would probably be the form of written material most likely to be required of a druggist. When a person needing such evidence applies for this writ, it is his duty to inform the court why such information is material. The witness summoned under this writ may not refuse to produce the papers merely because they contain private information or trade secrets. But, if he can convince the court that the private matter or trade secret is in no way relevant or material to the point in controversy the court will permit the witness to seal up or cover the secret parts. The failure to produce a document under this writ gives the other party to the suit a right to produce secondary evidence. Usually also a failure to produce the document in question is punished as contempt of court.

Readings: Subpoena *Duces Tecum*. Refusal to Produce Papers in Response to Subpoena, on the Ground That They are Private Papers. In re Bolster . (1910) 59 Wash. 655, 110 P. 547, 29 L. R. A. (N. S.) 716.

- (2) Production of Documents. McKelvey on Evidence (4 Ed) 459.

Druggist can be Compelled to Produce Prescriptions though They Incriminate Him

The Constitution of the United States provides that in a criminal case the accused cannot be compelled to be a witness against

himself, and like provisions are embodied in the state Constitutions. This fundamental law is construed broadly in favor of the witness. Under this rule a person being tried on a criminal charge cannot, as a witness, be compelled to produce private papers that contain incriminating information. This rule does not apply to prescriptions that are on file in a drug store. By law they are considered public documents, and not the private papers of the druggist.

Readings: Prescriptions Required to be Kept by Druggist are Not Private Papers. *State v. Davis* (1891) 108 Mo. 666, 18 S. W. 894, 32 Am. St. Rep. 640.

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CHAPTER 5

LABELS

Labels

In practically every state there is some sort of statute requiring proper labels to be placed upon drugs sold. These have been enacted in order to safeguard a purchaser in every possible way against mistakes arising from misinformation or lack of information, or arising from similarity of names or appearances of poisons and harmful drugs. These statutes cover a wide range of subjects, such as offering an imitation under the name of another article, removing contents from a package and replacing in whole or in part other substances, misbranding or mislabeling a package, inaccuracy as to statement of weight or measure of the contents of a package, and a number of others. The failure of a druggist to comply with laws and regulations in regard to labels will be considered negligence for which he is liable if injury results therefrom. However, such negligence on the part of the druggist does not relieve the purchaser from the exercise of due care and caution. Because of the great variety and diversity of statutes concerning labels, a number have been quoted.

Tennessee Law Requires Common Name of Medicine on Labels

Tenn. Code 1926, § 6748

Statute: Any person, except a practicing physician in prescribing for a patient, who sells and delivers any tartar emetic, laudanum, morphine, or other drug or medicine, without having the common name thereof written or printed on a label attached to the vial, box, or parcel containing the same, shall, on conviction, be punished as provided in section 6745.

Mislabeling by False Claim of Curative or Therapeutic Effect

Iowa Code 1927, § 3146

Statute: In addition to the requirements of the preceding section a drug shall also be deemed to be improperly labeled if

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the package or container or printed matter accompanying it bears or contains any representation regarding the curative or therapeutic effect of such drug or any of the ingredients contained therein which is false and fraudulent.

Poison—Failure to Label Not Proximate Cause of Injury

A druggist may fail to put the proper label on a poison as directed by the statute, and injury may result, but, if the failure to label was not the proximate cause of the injury, the druggist will not be liable. The rule is that "the violation of a statute will not support an action for damages on account of an injury sustained, unless such violation is the proximate cause of the injury." The offender would be liable though for the penalty imposed by the statute for such negligence. *People's Service Drug Stores, Inc., v. Somerville* (1932) 161 Md. 662, 158 A. 12, 80 A. L. R. 449.

Mislabeling of Germicide

Digest of Case:

Advertising, labeling, and selling a germicide as "most efficacious remedy known, an absolute remedy for, and the greatest remedy known, for mildew, fungus, curl-leaf, thrips, etc.," when in fact such compound was not efficacious for any such purpose, constituted a violation of the Economic Poison Act of 1921. *Gregory v. Hecke* (1925) 73 Cal. App. 268, 238 P. 787.

Label on Old Pill Box

Case:

SMITH'S ADM'X v. MIDDLETON.

Court of Appeals of Kentucky, 1902. 112 Ky. 588, 66 S. W. 368, 56 L. R. A. 484, 90 Am. St. Rep. 308.

To recover damages for the alleged negligent killing of Charles Earl Smith, an infant aged about 4 years. His mother and her sister called at defendant's drug store with an ordinary pill box bearing a label, besides the druggist's name, as follows: "1/4 grain of calomel." They handed this box to one of defendant's clerks, and asked him to furnish in the box 25 cents worth of calomel in one-fourth grain tablets, which he undertook to do. Mrs. Smith had three little children; Charles Earl being the second. He was complaining of a cold, and as a remedy she sought to administer what she believed was calomel, being some

of the pellets contained in the box referred to. She gave him three of these pellets—one at the end of each hour for three hours. It subsequently developed that, instead of calomel, the box contained morphine. The result was the death of the child. The court held that to put in charge of a business of this kind one with authority to dispense such poisonous and dangerous drugs as morphine, and where one gave such a deadly drug to one calling for calomel, placed it in a box labeled, "Calomel $\frac{1}{4}$ grain," without notice of the true nature of the drug furnished, was of itself such evidence of that degree of gross negligence that would warrant a jury in finding punitive damages against such wrongdoer. In a business so hazardous, having to do so directly and frequently with the health and lives of so great a number of people, the highest degree of care and prudence for the safety of those dealing with such dealer is required.

Review of Smith's Adm'x v. Middleton:

1. What was the purpose of the suit?
2. What error was committed by the druggist?
3. Why was the druggist liable for the error of his clerk?
4. Was there any negligence on the part of the purchaser?
5. What facts constituted gross negligence?
6. What degree of care and prudence is required of a druggist?
7. Formulate a rule for the case.

Failure to Label a Jug of Sulphuric Acid

Case:

BURK v. CREAMERY PACKAGE MANUFACTURING CO.

Supreme Court of Iowa, 1905. 126 Iowa, 730, 102 N. W. 793,
106 Am. St. Rep. 377.

Defendant is a corporation engaged in the manufacture and sale of creamery supplies, fixtures, etc., at the city of Waterloo. It keeps for sale, and sells, sulphuric acid, which is extensively used in all creameries. On or about January 26, 1903, it sold at retail to one Riedel a one-gallon jug of sulphuric acid, but failed to label the same as required by statute, or to indicate in any manner upon the package that it contained a deadly poison. Riedel owned and operated what was known as the "Crane Creek Creamery," in a rural community in Black Hawk county,

and he took the jug containing the acid to his said creamery, and placed it upon a shelf in one of the rooms thereof. It was the custom at this creamery to put buttermilk in jugs similar to the one in which the acid was placed, for the use of customers and employés of the creamery, who were invited and permitted to drink the milk placed therein. Harry O. Burk, plaintiff's minor son, who was then 17 years of age, was lawfully at the creamery on the 9th day of February, 1903, and, seeing the jug containing the acid, asked an employé at the creamery if he could have a drink of buttermilk. The employé, not knowing that the boy had his eye on the sulphuric acid jug, but supposing that he was referring to another close at hand which did contain buttermilk, told him that he could, and invited him to drink of the milk. Burk went to the jug containing the acid, and, supposing that it contained buttermilk, drank therefrom, and, as a result thereof, died the next day. The acid was taken about 2 o'clock in the afternoon of a bright day, and the room in which the jug was kept was well lighted. Burk's eyesight was good, and he could easily have seen a label had one been placed upon the jug. Creameries universally use sulphuric acid for the purpose of testing milk and cream for butter fat, and this the defendant company well knew. The jug containing the acid was a little larger than the buttermilk jug, but both were one-gallon white jugs, and there was nothing in general appearances to distinguish one from the other. Defendant knew that it was the custom of all creameries to provide buttermilk for people to drink, and that patrons thereof carried the same away for use at their homes.

Question: Where the seller of poison is guilty of negligence in not labeling the poison sold, as required by statute, and injury thereby results to another, is the seller relieved from liability by the fact that the purchaser left the poison, without a label, where it was likely to injure others?

DEIMER, J. The jury was fully justified in finding that but for defendant's act or omission the accident in question would not have happened. Under the testimony, the injury to plaintiff's son might well have been found to be the direct and proximate result of defendant's failure to label the jug containing the poison. Had it been labeled, the accident would not have happened, even though the managers of the creamery may have been negligent in placing it where they did. Moreover, had it been properly labeled, the jury might well have concluded that

there would have been no negligence on the part of the creamery managers in placing it where they did.

The direction to plaintiff's son to drink out of a jug was not of itself negligence. The person giving the permission did not know that the boy had in mind the jug containing the acid, and there is nothing to show that this person even knew there was a jug there containing acid.

The defendant might reasonably have foreseen that its act or omission was likely to cause injury to some one who might rightfully handle the jug, and it is not enough for it to say that it could not reasonably have foreseen the exact mishap. It may be said that no one has as yet given a very satisfactory definition of proximate cause. Indeed, one must of necessity look to practical distinctions on this subject, rather than to merely academic or theoretical ones, and, after all is said, each case must be decided largely on the special facts belonging to it. At most, the act of Riedel was a concurring and co-operating fault, and not in itself the producing cause of the injury.

Review of Burk v. Creamery Package Manufacturing Co.:

1. Why did the plaintiff sue a corporation?
2. What was the negligence of the defendant?
3. Did the Iowa statute require a label on poisons?
4. What was the business of Riedel?
5. Was Harry O. Burk negligent?
6. Did it make any difference that Harry was lawfully at the creamery?
7. What difference did it make that the accident happened on a bright day?
8. State the principal question involved.
9. If defendant had not been negligent, would the accident have happened?
10. Define "proximate cause."
11. What is meant by the producing cause of an injury?
12. State briefly the holding of the case.

Using Old Label

The plaintiff, a stone mason, sent a bottle labeled "Carbolic Acid" to a drug store to have the bottle filled with arnica, to use on an injured finger. By mistake the bottle was filled with carbolic acid, and the old label was not removed, nor a new label pasted on the bottle. The drug was used on the injured finger,

which in consequence had to be removed. The court held the druggist liable, saying that the negligence of the druggist was the proximate cause of the injury, and that the injured party was not guilty of contributory negligence because he used the carbolic acid to his injury, not heeding the old label, but supposing the liquid to be arnica. *Peterson v. Westman* (1902) 103 Mo. App. 672, 77 S. W. 1015.

False Label on Poison

The leading case, *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, states this rule "That a dealer in drugs and medicines, who carelessly labels a deadly poison as a harmless medicine, and sends it so labeled into market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. This liability is far-reaching, extending not only to the customer who purchased the medicine, but to all persons who, without fault, suffered in consequence of the false label."

Poison—Failure to Label—Two Kinds of Damages

As stated many times, states by statute require certain labels to be placed on containers of poisons. If such a statute is violated by not placing the required label on the poison when sold, and if in consequence an injury results, the negligent person may be liable in damages to two parties. The statute may make the offender liable to a fine and imprisonment, and the injured person, or his personal representative, may sue to recover for the injury actually suffered.

Negligence of Druggist may Not be Proximate Cause of Injury

Negligence is the "proximate cause" of an injury which follows only if it can be shown that, in the absence of such alleged negligence, the injury and damage complained of would not have occurred. Only in cases where the violation of a statute is the cause of injury will it support an action for damages. Under this rule a druggist was held not liable for failure to label a box containing strychnine "poison" as required by statute, because such failure was not the "proximate cause" of the injury resulting. There may be several proximate causes which con-

tribute to an accident, and, if each is an efficient cause without the operation of which the accident would not have happened, the injury may be attributed to any one, or all, of the causes.

Where Label Different from Prescription

In a recent Michigan case a mistake was made in writing the label, and, as an injury was alleged to have followed, an action was brought for \$25,000 damages. A physician wrote a prescription for Fowler's solution of arsenic, with directions for taking three drops of this substance in water after meals three times daily. The prescription was filled at defendant's drug store; the bottle containing it bore a label similar to those pasted on ordinary druggist's bottles, but there was nothing to indicate the poisonous nature of the liquid. On the label appeared the doctor's name, followed by the directions: "Teaspoonful in water after meals, three times daily." On receipt of this medicine the patient was given a teaspoonful in accordance with the directions. Immediately thereafter she appeared to be in great agony and threw herself from side to side of the bed, complained of pains in her stomach, and tried to vomit. In the suit which followed, it was alleged that the negligence of the defendant caused the injury and death of the patient.

The trial court considered that there was no evidence of negligence, and so held for the defendant, but the Supreme Court held that, when the prescription prepared by the physician directing that three drops should be taken and the directions on the bottle providing for a teaspoonful, without any warning that the medicine was poisonous, were before the court, there was sufficient evidence of negligence to carry the case to the jury. *Marx v. Schultz*, 207 Mich. 655, 175 N. W. 182.

Review of Marx v. Schultz:

1. What mistake did the druggist make?
2. What damages did the plaintiff demand?
3. What did the trial court hold?
4. What was the holding of the Supreme Court?
5. Why would a druggist make such a mistake?

No Label on a Keg of Formaldehyde

Case:

POWELL v. KEMPTON.

Appellate Court of Illinois, 1923. 231 ILL. App. 380.

Suit under the statute for damages resulting from the death of her husband, alleged to have been caused by the negligence of defendant. The plaintiff alleged that on March 18, 1922, the deceased applied to the defendant at his store for the purchase of a medicine or drug to be used in and about curing himself of a violent and temporary attack of headache; that defendant through his servant sold to the deceased a certain drug or medicine for the purpose of healing and curing him of said ailment; that said servant then directed deceased to take a prescribed dose of said medicine with a glass of water and directed him to get the water from a faucet in the corner of a certain room in defendant's place of business, and avers that in the corner of the room there were other faucets, one of which was a faucet to a keg containing formaldehyde; that the defendant carelessly permitted and allowed deceased to draw a glass of formaldehyde from the keg and to drink the same, thinking the same to be water. The plaintiff also averred that the formaldehyde contained in said keg was a mixture of methyl alcohol or wood alcohol, and that the defendant negligently and carelessly offered for sale formaldehyde from the keg without causing to be placed thereon a conspicuous label that the keg contained formaldehyde, and without placing on a conspicuous label the word "Poison," and without having thereon a skull and crossbones printed in red ink in type at least one-quarter of an inch in height, and avers that, by reason of the carelessness and negligence of defendant to label said keg, the defendant permitted deceased to take and drink a quantity of formaldehyde from said keg, and as a result the deceased was poisoned and died. The state statute required methyl alcohol or any preparation or mixture containing methyl alcohol, when "offered for sale, sold, delivered, or used to be conspicuously labeled and the word 'Poison' together with the skull and crossbones."

Question: Was this keg of formaldehyde being offered for sale, under the terms of the statute, and should it have been labeled?

HEARD, J. This term "offered for sale" has been at other times construed in pure-food statutes and statutes requiring la-

beling of poisons when offered for sale, and without exception it has been held that when a merchant places in his place of business an article of merchandise of kind and character consonant with his business, by so doing he offers the same for sale without making any specific offer of sale to any specific person.

Taking into consideration the object of the statute in question, which was to prevent injury by mistaking a poisonous substance for a harmless one, and that such mistakes are liable to be made by drug clerks when in a hurry, we are of the opinion that, under the statute in question, defendant, when he placed the keg of formaldehyde in his drug store for the purpose of sale, thereby offered the formaldehyde for sale and that it was the duty of the defendant to label the container in accordance with the requirements of the statute.

Review of Powell v. Kempton:

1. State the facts of the case briefly.
2. Why was the suit brought under a statute?
3. Does this mean a statute of the state of Illinois?
4. What kind of label should have been on a container of methyl alcohol?
5. State the question in the case.
6. How did the court define the term "offered for sale"?
7. Formulate a rule for this case.

Liability Where Labels on Two Medicines were Interchanged

Case:

MODEL DRUG CO. v. PATTON.

Court of Appeals of Kentucky, 1925. 208 Ky. 112, 270 S. W. 998.

Action by Amanda Patton against the Model Drug Company. Judgment for \$1,200 for the plaintiff, and defendant appeals.

The plaintiff is a colored woman of middle age. The drug company is operated by colored people in Covington. It holds itself out as prepared to fill prescriptions of doctors for medicine, and undertook, as it is alleged and admitted, to fill the prescriptions given by Dr. Randolph, a colored physician. The plaintiff had been sick for four or five days when she called in Dr. Randolph, who gave her two prescriptions, one for medicine to be taken internally, a teaspoonful in hot water at a time, and the other "creolin," an antiseptic, to be used in a gallon of water as a douche. It is alleged and satisfactorily proved that

the drug company, after filling the prescriptions and placing the medicines in separate bottles, reversed the directions, placing that for internal use upon the bottle containing the medicine for the douche. The attendants gave plaintiff two or more doses of the medicine from the bottle containing the douche prescription but labeled for internal use, which burned her mouth and throat and upset and deranged her stomach and digestive system, causing her much pain and suffering and disabling her for some weeks, as she claims.

Question: Were the defendants liable for the injury to the plaintiff, occasioned by the interchange of labels?

SAMPSON, J. The evidence for appellee, Patton, proved beyond question that she was poisoned as a result of the carelessness of the agents and servants of the drug company in putting the wrong label upon the bottle from which she was administered the poisonous medicine. She very graphically described her pain and suffering from the administration of the douche medicine. The evidence shows that the membranes of her mouth and throat were burned and caused to inflame and that her stomach and other digestive organs were upset by the swallowing of the disinfectant, prescribed by the physician as a douche. * * *

The testimony shows that appellant, Patton, was administered "creolin" in teaspoonful doses, and that it coagulated and roped in her mouth before she could swallow it, burning and causing her much pain in taking and swallowing it as well as afterwards. According to her testimony she was disabled to follow her usual occupation of laundress, or to attend to her household duties for a considerable period of time. The evidence was amply sufficient, we think, to support the verdict. Had appellee been of the white race and occupied a higher station in life, the verdict, no doubt, would have been for a much larger sum of money, even though the injuries inflicted were exactly the same, a sad commentary on our civilization and judicature.

Review of Model Drug Co. v. Patton:

1. What mistake was made by the defendant?
2. What was the principal question?
3. Why was the druggist liable for the negligence of his agents and servants?
4. Did the court consider the damages too large?
5. What comment did the court make on the station in life of the plaintiff?

Failure to Label Drugs does Not Relieve Purchaser from Exercise of Reasonable Care

Case:

ANKENBRANDT v. JOACHIM.

Appellate Court of Illinois, 1912. 173 Ill. App. 158.

Suit for injuries caused by taking poison. The plaintiff, who was a farmer and at times practiced veterinary surgery, purchased from defendant a bottle of castor oil and some Rochelle salts, which he desired to take for himself, and also some sulphate of zinc to make a wash to be applied to a colt's foot. The salts and sulphate of zinc were wrapped in separate packages, and the latter was then attached to a bottle containing the oil by a rubber band. When plaintiff reached home, he placed the bottle and the package containing the sulphate of zinc, the two being still attached to each other by the rubber band, on a shelf in his room, and the other package, containing the Rochelle salts, he placed on a shelf in a cupboard with medicine used by him in his veterinary work. A few days later, the plaintiff wished to take a dose of salts, and his wife took the package attached to the bottle and prepared it for him, and it was soon discovered that he had taken the sulphate of zinc. He suffered severely from the effects of the poisoning.

The plaintiff brought suit and alleged that the druggist had negligently and carelessly placed the sulphate of zinc in the same package with castor oil, without having labeled the former a poison and without placing labels of any kind upon any of the packages as required by statute.

- Questions:*
- (1) Would the failure to perform the statutory duty of placing labels on drugs constitute negligence per se?
 - (2) Does the negligence of a druggist in failing to label drugs sold, as required by statute, relieve the purchaser from the exercise of reasonable care and caution in their use?

HIGBEE, J. We are inclined to agree with appellant (plaintiff) in the theory, that if appellee (defendant) failed to perform his statutory duty to place labels on drugs sold, such omission on his part constituted negligence per se.

But such act of negligence on the part of appellee (defendant) would not relieve appellant (plaintiff) from the exercise of reasonable care and caution on his part in using the drugs. It is the fixed rule of law in this state, that "Where a party seeks to recover damages for a loss, which has been caused by negligence or misconduct, he must be able to show that his own negligence or misconduct has not concurred with that of the other party in producing the injury; and the burden of proof is upon the plaintiff to show, not only negligence on the part of the defendant, but also that he exercised proper care and circumspection, or, in other words, that he was not guilty of negligence."

The judgment was for the defendant, as the jury did not find facts to sustain the plaintiff's contentions.

Review of Ankenbrandt v. Joachim:

1. What was the nature of the injury?
2. The plaintiff pleaded what acts of negligence on the part of the druggist?
3. Do you think the plaintiff exercised due care?
4. Did the plaintiff's wife exercise due care?
5. In this case, what facts were left to the jury to decide?
6. Give the meaning of negligence per se.
7. Can there be negligence which causes no injury?
8. Why can there be no recovery by the plaintiff unless he exercised reasonable care and caution?
9. What facts in this case would be difficult to prove?
10. Is it a harsh rule to require the plaintiff to prove that he exercised due care and caution?

Statute Requiring Poison to be Labeled Not Complied with

Case:

OSBORNE v. McMASTERS.

Supreme Court of Minnesota, 1889. 40 Minn. 103, 41 N. W. 543,
12 Am. St. Rep. 698.

Action for negligence. The defendant's clerk in his drug store, in the course of his employment as such, sold to the plaintiff's intestate a deadly poison without labeling it "poison" as required by statute. She, in ignorance of its deadly qualities, partook of the poison, which caused her death.

Question: If one neglects to perform a specific duty imposed upon him by a statute or municipal ordinance, for the protection or benefit of others, does he become liable to those for whose protection or benefit it was imposed, for injuries of the character ~~it~~ was designed to prevent?

MITCHELL, J. It is now well settled, certainly in this state, that where a statute or municipal ordinance imposes upon any person a specific duty for the protection or benefit of others, if he neglects to perform that duty he is liable to those for whose protection or benefit it was imposed for any injuries of the character which the statute or ordinance was designed to prevent, and which were proximately produced by such neglect.

Review of Osborne v. McMasters:

1. What was the nature of the action?
2. State the question involved.
3. What is a municipal ordinance?
4. What was the purpose of the statute under consideration?
5. State the holding of the court.

Readings: The Law of Labels.

1. Oil of Bitter Almonds Not Properly Labeled. *Davis v. Guarnieri* (1887) 45 Ohio St. 470, 15 N. E. 350, 4 Am. St. Rep. 548.
2. Liability of Manufacturer of Drugs for Injury Resulting from Improper Label. *Blood Balm Co. v. Cooper* (1889) 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324.
3. Druggist Failed to Label Poison as Required by Statute. *Sutton's Adm'r v. Wood* (1905) 120 Ky. 23, 85 S. W. 201, 8 Ann. Cas. 894, 27 Ky. Law Rep. 412.
4. Violation of Statute Requiring Entry before Delivery of Poison. *Campbell v. Stamper Drug Co.* (1929) 85 Colo. 508, 277 P. 770.

Adulteration of Drugs under State Laws

Adulteration has been the subject of much litigation, but the greater part of it has been in connection with the Federal Food and Drug Laws and will appear in part 2 of this book. However, the states do have food and drug acts which prohibit under

penalty the sale or dispensing of drugs or medicines which are not up to the standard of strength, quality, and purity established by the United States Pharmacopœia. These statutes provide that an article shall be considered adulterated (1) if it falls below the standard of the United States Pharmacopœia, and (2) if it fails to come up to the professed standard under which it is advertised and sold.

Usually if a drug is volatile it is not considered a violation of the statute if it falls below the standard, provided it was properly compounded at full strength and due to its volatility has lost strength since being compounded. The following is a case often cited as to adulteration of volatile drugs:

Volatile Drugs—Loss in the Preparation in Partial Evaporation

Where the pharmaceutical preparation in question is volatile in nature, a penalty should not be imposed where it is shown that the preparation was actually compounded according to the standard of the pharmacopœia and a loss in the preparations of the mixture took place subsequently in the partial evaporation of one or more of the volatile elements. This is a reasonable rule, if it be kept in reasonable bounds. The plain object of the statute is to keep the pharmaceutical preparations at the time of their sale up to a standard of "strength, quality and purity." The efficiency of the preparations may depend upon the proportions of the elements combined. If some of these elements are volatile, there may be some loss in the proportions even in a very short time. Where that loss is insubstantial, no just complaint can be made. At the same time, the loss in one element may so increase the relative strength of the other element as to impair seriously the purpose for which the preparation is intended to be used, in which case it should not be enough to show that a preparation sold months or years after its original compounding complied with the law when compounded, although it did not comply with the law when sold. The statute looks rather at the time of sale, for it was framed for the protection of the public in the use of the article sold. A pharmaceutical preparation may be so stale as to be comparatively useless. *State Board of Pharmacy v. Malkin* (1910) 138 App. Div. 17, 122 N. Y. S. 466.

CHAPTER 6

POISONS

Poison Defined ¹

Poison is defined in Webster's Dictionary as "any substance which, when introduced into the animal organism, is capable of producing a morbid, noxious, or deadly effect upon it." This definition has been used as a framework by judges in many cases. In *Hiller v. State* (see readings), the court stated that "Poison may well be defined as any substance which, when introduced into the system, either directly or by absorption, produces violent, morbid, or fatal changes, or which destroys living tissues with which it comes in contact."

Readings: Poison Defined.

1. See "Poison" in Words and Phrases Judicially Defined.
2. As Defined by Lexicographers and Law-Writers. *Boswell v. State* (1901) 114 Ga. 40, 39 S. E. 897.
3. Noxious Potion. *Runnels v. State* (1903) 45 Tex. Cr. R. 446, 77 S. W. 458.
4. Word Used in Loose Sense. *United States Mutual Acc. Association v. Newman* (1887) 84 Va. 52, 3 S. E. 805.
5. Poisonous Liquid. *Kelly v. Ross* (1912) 165 Mo. App. 475, 148 S. W. 1000.
6. Throwing Poison. *Hiller v. State* (1928) 116 Neb. 582, 218 N. W. 386, 58 A. L. R. 1322.

Poisons—Regulating Sales by Statute

Another subject that comes under the police power of the state in reference to the protection of the lives and health of the

¹ *No Satisfactory Definition for Word "Poison."* Report of the Committee on Potent and Toxic Drugs of the National Drug Trade Conference:

"Because of the impossibility of framing a definition for poison which will serve as an accurate guide in every case, and also because of the unsatisfactory condition of many state poison laws, The National Drug Trade Conference has undertaken the preparation of a reference list of drugs and chemicals which should properly bear the poison label when dispensed otherwise than upon the prescriptions of physicians." Reprinted from the *Journal of the American Pharmaceutical Association*, vol. XXII, No. 6, June, 1933.

public is that of the sale of poisons. To this end, many state statutes have been passed which generally forbid "The sale of poisons at retail without affixing to the bottle, box, vessel, or package containing the drug a label printed or plainly written containing the name of the article, the word 'Poison,' and the common name of two or more readily accessible antidotes; or the delivery of poison to any person without assurance that it is to be used for legitimate purposes."

Since the law imposes these certain duties upon a druggist in compounding or selling poisons, one who neglects to perform these duties becomes liable in damages for the injury resulting. The failure to perform the duty imposed by statute is negligence *per se*. Thus the failure to place the label on poisons as required by statute shows not only a want of due care, but is held to be negligence *per se*.

Statutes Regulating Sale of Poisons

In the Tennessee case (see readings) a father secured a prescription from an oculist for eye treatment, which was filled by a druggist and properly labeled, except it did not contain the label "Poison." Shortly thereafter a small child secured the bottle from a shelf and drank the contents, which caused death. The court held that the statute requiring any person selling any poisonous substance to have it labeled "Poison" did not apply to medicine compounded by druggists upon the prescriptions of physicians. Of course, if it had been labeled "Poison," probably the bottle would have been kept in a much safer place, and after accident had happened the mother would have taken immediate steps to counteract the effect of the poison. As stated in the opinion: "It is in proof that a large proportion of medicines and druggists' compounds contain ingredients of poison; and it is argued that if all medicines containing poison, no matter how minute in quantity, must be labeled 'Poison,' nervous and excitable persons would refuse to take the remedy prescribed, for fear of the consequences, or, if taken, its therapeutic efficacy would be destroyed by the mental excitement and uneasiness aroused."

Duties Imposed When Poisons Sold

Neb. Comp. St. 1922, § 9566

Statute: Every apothecary, druggist or other person who shall sell or give away, except upon the prescription of a physi-

cian, any article, or articles of medicine belonging to the class usually known as poisons shall be required:

First. To register in a book kept for that purpose the name, age, sex and color of the person obtaining such poison;

Second. The quantity sold;

Third. The purpose for which it is required;

Fourth. The day and date on which it was obtained;

Fifth. The name and place of abode of the person for whom the article is intended;

Sixth. To carefully mark the word "poison" upon the label or wrapper of each package;

Seventh. To neither sell nor give away any article of poison to minors of either sex.

Readings: Statutes Regulating Sale of Poisons.

1. Must Prescription Calling for Poison When Filled be Labeled "Poison"? *Wise v. Morgan* (1898) 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.
2. No Label, but Purchaser Given Full Warning. *Wohlfahrt v. Beckert* (1883) 92 N. Y. 490, 12 Abb. N. C. 478, 44 Am. Rep. 406.
3. Breach of Statutory Duty. *Sutton's Adm'r v. Wood* (1905) 120 Ky. 23, 85 S. W. 201, 8 Ann. Cas. 894.
4. Statutes Regulating the Sale of Poisons. *Edwards v. Pharmaceutical Society of Great Britain*, [1910] 2 K. B. 766, 20 Ann. Cas. 488.
5. Construction of Statutes Regulating the Sale of Poisons. *Katzman v. Commonwealth of Kentucky* (1910) 140 Ky. 124, 130 S. W. 990, 30 L. R. A. (N. S.) 519, 140 Am. St. Rep. 359.

Liability of Retailer on Sale of Poisonous Compound

If a druggist sells and delivers to a customer a compound put up by another, under the label and printed directions of the manufacturer or compounder, he is not liable for a resulting injury unless some negligence in the transaction can be imputed to him. The retailer is liable only if he has knowledge that the drug is inherently dangerous, or if facts connected with the preparation, marketing, or printed matter on the substance sold are such as to charge him with such knowledge. If the vendor knows, or is charged with knowledge, of the dangerous qualities of the substance he sells, and also knows that neither the name, label, nor appearance indicate the dangerous character, it is negligence on

his part not to take the proper steps to protect his customer. Unless some special circumstance exists, it is not the duty of the retailer to know or ascertain the ingredients of secret or proprietary preparations sold by him.

Readings: Duty of Retailer of Dangerous Compounds.

1. Seller had No Knowledge of Dangerous Compound Sold by Him. *Cliff v. California Spray Chemical Co.* (1927) 83 Cal. App. 424, 257 P. 99.
2. Duty of Retailer of Dangerous Compounds. *McCrossin v. Noyes Bros. & Cutler* (1919) 143 Minn. 181, 173 N. W. 566.

Failure to Make Proper Record on Sale of Poison

Case:

CAMPBELL v. STAMPER DRUG CO.

Supreme Court of Colorado, 1929. 85 Colo. 508, 277 P. 770.

Action for \$5,000 by Cora E. Campbell against Stamper Drug Company for damages for the death of her husband. The plaintiff alleged, in substance, that her husband called for quinine, but by the negligence of the clerk he was given strychnine, and, after partaking of the same, died of strychnine poisoning. The facts showed that the clerk failed to ascertain that the purchaser was aware of the poisonous nature of the drug before it was delivered as required by the statute. The clerk testified as follows: "A. Mr. Campbell came in that night in a hurry, * * * 'Bob, I would like to have a small bottle of strychnine.' I turned and went to the back room, to the prescription case, * * * I started to wrap up this strychnine for him, and he says, 'No, don't wrap it up, I am in a hurry.' I laid down the strychnine and told him it was forty cents. He held up two packages of gum he had gotten while I was gone and laid down fifty cents and went out in a hurry."

The witness thereupon made the following entry in defendant's poison record:

Day of Month	To whom Delivered	Address	Quantity	Kind	Purpose Represented	By whom Delivered
2/15/27	Wm. Campbell	Ft. Morgan	$\frac{1}{2}$ z.	Strych	Rats	R. K.

Section 4598 of the Compiled Laws of Colorado 1921, is as follows:

"4598. * * * Every person who shall dispose of or sell at retail or furnish any poisons included under schedule A shall, before delivering same, make or cause to be made, an entry in a book kept for the purpose, to be furnished by the state board of pharmacy, stating the date of sale, the name and address of the purchaser, the name and quantity of poison, the purpose for which it is represented by the purchaser to be required, and the name of the dispenser, such book to be always open for inspection by the proper authorities and to be preserved for at least five years after the last entry. He shall not deliver any of said poisons without satisfying himself that the purchaser is aware of its poisonous character, and the said poison to be used for a legitimate purpose."

Question: On the testimony of the clerk himself, did he comply with the statute?

MOORE, J. The uncontroverted evidence discloses that Campbell had no intention of committing suicide; that when he took the fatal capsule, he believed he was taking quinine; that Kelley, defendant's agent, sold Campbell strychnine; that in said sale Kelley failed to comply with section 4598 of the Compiled Laws of 1921, *supra*, in that before delivering said strychnine poison he failed to make an entry in a book kept for that purpose; that said poison was delivered to Campbell without Kelley satisfying himself that the purchaser was aware of its poisonous character and that it was to be used for a legitimate purpose.

Proof of the violation of said statute, such as here shown, is sufficient to make out a *prima facie* case of negligence against the defendant. The Legislature undoubtedly intended to prevent a person from purchasing poison for self-destruction; also to surround a purchaser of drugs with every possible safeguard against mistakes occasioned by misinformation, lack of information, mispronunciation, or arising out of the similarity of the sound of names of poisons and harmless drugs. It was not a sufficient compliance with this statute to show that the strychnine in question was wrapped in red and labeled "poison." To hold otherwise would nullify the other statutory requirements.

Review of Campbell v. Stamper Drug Co.:

1. What amount of damages was asked?
2. What mistake was alleged to have been made?

3. What was the testimony of the clerk?
4. Was the druggist liable for the mistake of his clerk?
5. What record is required by the Colorado statute when poison is sold?
6. Indicate the different ways in which the clerk failed to comply with the statute.
7. Why did the facts constitute a *prima facie* case of negligence?
8. What benefits did the Legislature hope to secure by the statute?

Insufficient Record of Sale of Poison

Digest of Case:

A druggist sold corrosive sublimate and entered the sale on a slip of paper which was put into an envelope kept in a safe. Held that the druggist had violated the statute requiring definite facts of such sales to be kept in a book. *State v. Hopkins* (1913) 4 Boyce (27 Del.) 306, 88 A. 473.

Carelessly Leaving Poisonous Liquor Where Guest Finds It

Case:

KEILEY v. BRISTOL.

Court of Appeals of Georgia, 1923. 30 Ga. App. 725, 119 S. E. 334.

An action for injuries sustained in drinking poisonous and deleterious liquor.

Question: If one carelessly leaves poisonous liquor where a guest finds it, is the owner liable for injury sustained thereby?

Held: Where a person, with knowledge that liquor within his control and intended to be used as a beverage contains a poisonous and deleterious ingredient known as wood alcohol, or whose lack of knowledge under the circumstances is negligence, carelessly leaves or deposits the same where he knows, or has reason to know, or by the exercise of ordinary care should know, that one who is lawfully on his premises, such as a guest in his house, will find the liquor, and where such guest, in ignorance of the poisonous character of the liquor, drinks it, and by reason of its poisonous character suffers a physical injury, the person thus

carelessly leaving the liquor where his guest can find it is liable for the injuries thus sustained, provided that the person injured could not by due care have avoided the injury.

Review of Keiley v. Bristol:

1. State the question involved.
2. What was the act of carelessness?
3. Why is the holding of this case good law?
4. Formulate the rule briefly.

Poison Sold under False or Improper Label

It is a general rule that a retailer of drugs and medicines, who carelessly labels a deadly poison as a harmless medicine and sends it so labeled into the market, is liable to all persons who, without fault on their part, are injured by using it as such medicine in consequence of the false label. A careful analysis of the above rule shows that the injured person must be free from fault in his own conduct, and that the failure to use the proper label must be the proximate cause of the injury. A similar liability arises if the manufacturer of a patent or proprietary medicine places a label on the container recommending it for certain diseases, and giving directions as to the size and frequency of doses to be taken, and injury results to the user who follows directions carefully and is injured through no fault of his own.

No Label on Poison Sold When Statute Imposes No Duty

Case:

FORNEY v. SEARS.

Supreme Court of Washington, 1929. 153 Wash. 615, 280 P. 56.

Action by C. H. Forney, administrator of the estate of Baker N. Sheets, deceased, against George L. Sears. Baker N. Sheets lived in the home of Mrs. Pierce. Some time in March, 1927, Mrs. Pierce purchased from Sears at his place of business a quantity of sodium fluoride, which was in a pasteboard box or container, and was labeled "Sodium fluoride." March 1, 1928, Baker N. Sheets purchased from Sears a certain preparation, or nonpoisonous drug, commonly known as "salts," which he delivered to Mrs. Pierce, on the morning of March 16, 1928. Sheets, being desirous of taking a dose of the "salts" sought for the same, and found instead thereof the container filled with

sodium fluoride. He took a dose of this, and during the afternoon of the same day died.

Sodium fluoride and salts have a similar appearance, and the containers in which they were placed were much alike. It is alleged that sodium fluoride is an uncommon drug, the poisonous character of which is not known to the public generally, but only to druggists, physicians, and chemists. It is not alleged in the complaint that the sodium fluoride was sold to Mrs. Pierce as a medicine or that it was ever used as such. Sears is charged with being negligent in that he did not label the sodium fluoride as a poison. There was no statute in California at this time which imposed a duty on Sears to so label the sodium fluoride as poison when he sold it to Mrs. Pierce.

Question: Was Sears liable for not having put a "Poison" label on the sodium fluoride when no such duty was imposed by state statute?

MAIN, J. In 9 R. C. L., p. 705, the rule is stated as follows: "While the law is clear that where a druggist negligently gives a poisonous drug to a person, for the purpose of being swallowed by him, and such drug is so swallowed and produces injury, the druggist is liable for the injury unless the injured person was also guilty of negligence which contributed to the injury, a different question is presented where the druggist sells a dangerous drug, properly labeled, whose properties are known, without any instructions as to its use. In such a case the rule deducible from reason and from the authorities is that when a person who has reached the age of discretion, and who is apparently in the possession of his mental faculties, applies to a druggist for a certain drug, he represents to the dealer, by implication at least, that he knows its properties and uses, and that he is a fit person to whom sale thereof may be made. Consequently unless there is something connected with the transaction, or something previously known to the seller, indicating that the would-be purchaser cannot safely be intrusted with the substance, a sale of it may be made without explaining its properties or the manner in which it may be safely used or handled; and under such circumstances the seller is not liable in damages for injuries to the purchaser resulting from the improper use or handling of the article, no matter how little knowledge the purchaser may in fact have had of its properties, or of the danger attending its use."

It must be remembered that this is not a case (a) where a dangerous explosive has been sold without informing the purchaser of its properties and the danger attendant upon its use; (b) where a dangerous article has been wrongfully labeled as a substance which is not dangerous; (c) where there has been a violation of a statutory duty to label; or (d) where an article has been defectively manufactured, and when sold and put to the use that was intended, it breaks or explodes. Without reviewing the authorities cited by appellant in detail, it may be said that, from an examination of them, we find that they fall into none of the four classes just stated. Mrs. Pierce having got what she sought to purchase, and it being correctly labeled "sodium fluoride," and there being nothing to show that she was not a fit person to whom the sale could be made, it follows that the respondent did not fail in the performance of any legal duty imposed upon him.

The fact, as alleged in the complaint, that sodium fluoride had dangerous qualities which are not generally known except to druggists, physicians, and chemists, does not take this case out of the rule of nonliability. [The defendant was held not liable.]

Review of Forney v. Sears:

1. What charge of negligence was made against Sears?
2. Why was this case not governed by a statute?
3. What is the question involved?
4. What four situations are given to which this case did not belong?
5. Formulate a rule for the case.
6. Was there a prescription involved in this case?
7. Had any mistake been made by the defendant?
8. What mistake was made by the deceased?

Poisons—Leaving Poisons Exposed

As stated elsewhere, it is a general rule that one who has in his possession or under his control a dangerous instrumentality is under obligation to exercise caution to prevent injury being done thereby. As applied to poisons, the rule is that, if a person knows, or by the exercise of ordinary care should know, that a substance is poisonous, a duty rests upon him not to expose others to danger in the possession or handling of the poison. For example, a person knowing that liquor in his possession contained a poisonous ingredient carelessly left the liquor where

a guest in his house found it and drank it, to his injury. The possessor was liable for injury caused by his carelessness. Another illustration of such liability is that of the owner of a flat who, undertaking to prepare the place for the occupancy of a tenant, left a glass of poison on the drain board of the sink which a child of 18 months drank and was injured.

Poison—Keeping Carbolic Acid in Unlabeled Whisky Bottle

Case:

PELL v. HERBERT.

District Court of Appeal, Third District, California, 1917. 33 Cal. App. 730, 166 P. 386.

This is an appeal from a judgment in plaintiff's favor for the sum of \$2,000 for the alleged negligence of the defendant resulting in the death of one Gabino Smith. The facts of the case are these: The defendant is a rancher residing in Monterey county. On the morning of September 28, 1913, the deceased, Gabino Smith, who was at that time his employee, came up to his house to wash before breakfast. The defendant was in the act of taking a drink of whisky from a bottle which was sitting on the wash sink, and offered the deceased a drink, which he indicated his willingness to accept. There was very little left in the bottle from which the defendant had been drinking, so he reached under the sink and got what he apparently supposed was another bottle of whisky, and handed it to the deceased, stating that he guessed it was whisky. The deceased drank from the bottle which was handed him, and immediately after doing so said to the defendant, "What kind of a trick did you play on me?" and went presently into convulsions, and died within a few moments. The bottle from which he drank contained carbolic acid.

Question: Did the acts of the defendant constitute gross negligence?

Held: The defendant's conduct in keeping carbolic acid, a deadly poison, in a whisky bottle without any distinguishing mark or label showing its dangerous and deadly quality, and of intermingling such bottle with such a content with other similar bottles containing whisky or other drinkables, and the act of the defendant in tendering such bottle containing carbolic acid

to the deceased under the circumstances which he himself detailed, were acts of gross negligence amply sufficient to justify the verdict in plaintiff's favor.

The acts of the deceased in accepting the defendant's proffered drink, and of assuming without question or investigation that the bottle from which he drank contained liquor similar to that which he had just seen his employer drink, and in believing it to be the whisky which he had just been invited to partake of, were in keeping with the ordinary and customary conduct of other individuals under like circumstances. It is to be noted that the liquid which he drank was not poured out in a glass or other open receptacle where its color or smell or other dissimilarity to whisky might reasonably attract his notice and arouse his suspicion, but that he was handed the bottle and was expected to and did drink directly from it. Under these circumstances we cannot say as a matter of law that his act in so doing was contributory negligence.

Review of Pell v. Herbert:

1. How large a judgment had been secured?
2. State the facts briefly.
3. What is the question involved?
4. What acts constituted gross negligence?
5. Did the acts of the deceased constitute negligence?

Readings: Leaving Poisons Exposed.

1. Poisonous Liquor. Keiley v. Bristol (1923) 30 Ga. App. 725, 119 S. E. 334.
2. Sulphuric Acid—Attractive Nuisance Doctrine Not Applicable. Sugar Creek Creamery Co. v. Eads (1927) 87 Ind. App. 381, 158 N. E. 520.
3. A Drinking Glass of Oxalic Acid Left Where Child of 18 Months Drank It. Martinson v. Neubert (1921) 150 Minn. 263, 185 N. W. 651.
4. Duty of Railroad Company to Fence a Dipping Vat Containing Poison to Protect Trespassing Cattle. Midland Valley R. Co. v. Rippe, 61 Okl. 314, 161 P. 233.

Poison Labels in Arizona

Ariz. Civ. Code 1913, par. 4812

Statute: The label required by this chapter, to be placed on all packages of poison, shall be printed upon red paper in distinct white letters, or in distinct red letters upon white pa-

per, and shall contain the word "poison," the "vignette" representing the skull and cross-bones, and the name and address of the person or firm selling the same. The name of an antidote, if any there be, for the poison sold, shall also be upon the package together with directions for the use of such antidote. No poison shall be sold or delivered to any person who is less than eighteen years of age.

Poison—Use of Peyote (Pellote) Regulated by Statute

Big Sheep, an Indian, was prosecuted under a Montana statute which provided that it is unlawful for any person to sell, furnish, or give away, or to have in his possession peyote (pellote), botanically known as *Lophophora Williamsii*. His defense was that he was a member of the Native American Church, and that peyote is used by the members of that church for sacramental purposes only, in the worship of God according to their belief and the interpretation of the Holy Bible, and according to the dictates of their conscience. The Constitution of Montana guarantees the free exercise and enjoyment of religious profession and worship, without discrimination, but also provides that the liberty of conscience thereby secured shall not be construed to dispense with the oaths or affirmations, excuse acts of licentiousness, by bigamous or polygamous marriage, or otherwise, or justify practices inconsistent with the good order, peace, or safety of the state. It was held to be clearly within the power of the Legislature to determine whether the practice of using peyote is inconsistent with the good order, peace, and safety of the state. *State v. Big Sheep* (1926) 75 Mont. 219, 243 P. 1067.

Review of State v. Big Sheep:

1. What kind of drug is "peyote"?
2. Why should the use of it be regulated by statute?
3. Was the prosecution under a state or federal statute?
4. What defense was attempted by the Indian?
5. What does the Montana statute provide as to religious freedom?
6. What acts are not to be construed as coming within the protection of the statute?
7. Why is the use of peyote inconsistent with the good order, peace, and safety of the state?

New Mexico Controls Importation of Cannibas Indica

N. M. Laws 1923, c. 42, par. 1

Statute: It shall be unlawful to import into the State of New Mexico cannibas indica, also known as hashish and mariguana in any form or any preparation or derivative thereof; provided, that cannibas indica, also known as hashish and mariguana, may be imported for medicinal purposes only, and then only by licensed pharmacists and licensed physicians of the State of New Mexico.

Embalming Fluids Containing Mineral Poisons

Fla. Laws 1925, c. 10120, § 16

Statute: It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, or distribute, within this State any embalming fluids containing mineral poisons.

Vermont Law Regulating the Sale or Use of Embalming Fluids

Vt. Laws 1927, No. 109, § 2

Statute: The sale or use for embalming purposes of any fluid containing arsenic, zinc, mercury, copper, lead, silver, antimony, chloral, or cynaogen, or of any compound containing any of these, or any poisonous alkaloid, is prohibited, and all brands of embalming compounds used within the State shall be tested and approved by the State Board of Health.

Burden of Proof Where Poison Statutes Contain Certain Exceptions

Burden of proof means the obligation resting on a party who alleges the existence of a fact necessary in the prosecution or defense of an action to establish such fact by proof. Usually, in criminal cases, the burden of proof rests upon the state. However, if a statute relating to poisons contains exceptions and the accused desires to bring his act within the protection of the exception in the statute, he must assume the burden of establishing the fact that he does come within the provisions of the saving clause. Thus, in case of a statute providing that no person shall have in his possession any of certain designated narcotics except upon the written order or prescription of a physician,

dentist, or veterinary surgeon, it was held that it was not incumbent upon the prosecution to prove that the accused did not come within any of the exceptions, and that, when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party.

Readings: Burden of Proof Where Statute Contains Exceptions.

1. Exceptions Permitting Possession of Narcotics. *People v. Moronati* (1924) 70 Cal. App. 17, 232 P. 991.
2. Accused must Show Why He Came under the Exception When Charged with Unlawful Possession of Opium Derivatives. *State v. Miller* (1929) 127 Kan. 487, 274 P. 245.
3. Not Necessary for Prosecution to Prove Exceptions in Antinarcotic Statute. *Carr v. State* (1923) 25 Okl. Cr. 289, 220 P. 479.
4. Information Charging Possession of Narcotics Need Not Allege Accused Acquired Them without Prescription or Contrary to Law. *State v. Young* (1927) 142 Wash. 388, 253 P. 637.

Judicial Notice in Poison Cases—Matters of Common Knowledge

Judicial notice is a phrase used to express the doctrine that a court for the purposes of the case may accept the truth of certain well-known or notorious facts without requiring proof. It does away with the formal presentation of evidence because there is no need of it. Judges and juries may take cognizance of certain facts because they are already known to them. Usually courts take judicial notice of facts which are considered as a part of the common knowledge of persons of ordinary understanding and intelligence. It is not necessary, in either criminal or civil cases, to plead facts of which the court will take judicial notice, and the parties to the suit have no right to introduce evidence of facts subject to judicial notice. Thus, the courts will take judicial notice that natural gas is dangerous, but will not explode spontaneously; that alcohol is spirituous and intoxicating.

Criminal Law—Judicial Notice of Opiate User's Need of Keeping Nerves Stimulated

"It is known as a matter of common knowledge that a confirmed user of opium, morphine, cocaine, and other like opiates must at all times keep his system of nerve fibers maintained to a certain condition of stimulation, and that when the effects of the poison are disappearing, will develop a state of desperation unless the poisonous drug is immediately accessible to him. This proposition is, indeed, so generally known and understood that it would be absurd to say that the courts and juries may not take notice thereof and apply it where necessary in the determination of an issue such as is presented here." *People v. Le Baron* (1928) 92 Cal. App. 550, 268 P. 651, 269 P. 476.

Review of People v. Le Baron:

1. What is the meaning of the phrase "judicial notice"?
2. When will the court take judicial notice of facts?
3. How is the procedure of a trial changed, when the court takes judicial notice of facts?
4. Under what circumstances may juries take judicial notice of facts?

Readings: Judicial Notice in Poison Cases.

1. That Morphine is a Derivative of Opium. *Commonwealth v. Gabhart*, 160 Ky. 32, 169 S. W. 514.
2. That Morphine is a Narcotic Drug. *Smith v. State*, 32 Okl. Cr. 247, 240 P. 656.

Presumption in Poison Cases

A presumption has been defined as "a deduction which the law expressly directs to be made from known facts." In criminal cases there may be presumptions of innocence, sanity, knowledge of the law, and that a person intends the natural and probable consequences of his act. It is quite usual for statutes defining crimes in relation to poisons to provide that possession of a certain drug shall be *prima facie* evidence of an intent to sell, or presumptive evidence that the statute has been violated, or that the sale was not upon a prescription, or did not fall within the excepted class.

Readings: Presumptions in Poison Cases.

1. Application of Statute Making Possession of Cocaine Prima Facie Evidence of an Intent to Sell or Dispose. *Henderson v. Commonwealth* (1921) 130 Va. 761, 107 S. E. 700.
2. Proof of Possession of Opium is Presumptive Evidence Sustaining Conviction of Unlawful Possession. *State v. Charlie Mun* (1926) 76 Mont. 278, 246 P. 257.
3. Presumption that Sale was Unlawful Relieves State of Necessity of Proving the Negative. *Miller v. State* (1913) 105 Miss. 777, 63 So. 269.

Poisonous Fumes—Injury to Employee

An employer must exercise reasonable care to protect his employees from injury while they are in his service and obeying his orders. It is his duty to warn them of dangers to which they will be exposed while performing the duties expected of them. In order to be able to give the proper warning to protect his employees, the employer must be familiar with the dangers that accompany his occupation. Applying these principles, an employer is presumed to know the dangers from poisonous fumes arising from materials handled by his employees in the course of their regular work. It is not sufficient for the employer merely to give warning that the material is poisonous. He should point out the particular dangers to be guarded against.

Readings: Poisonous Fumes.

1. Inhaling Fumes of Nitric Acid. *Wagner v. H. W. Jayne Chemical Co.* (1892) 147 Pa. 475, 23 A. 772, 30 Am. St. Rep. 745.
2. Servant in White Lead Manufactory Not Held as Matter of Law to have Knowledge that Inhalation of Fumes and Dust have Tendency to Produce Lead Poisoning, with Loss of Teeth, Paralysis, and Derangement of Digestive Organs. *Pigeon v. W. P. Fuller & Co.* (1909) 156 Cal. 691, 105 P. 976.
3. Liability of Master for Injuries to Servant from Fumes. *Pinkley v. Chicago & Eastern Illinois Railroad Co.* (1911) 246 Ill. 370, 92 N. E. 896, 35 L. R. A. (N. S.) 679.

Arizona Law Prohibiting the Poisoning of Domestic Animals

Ariz. Laws 1929, c. 106, p. 415

Statute: Every person who wilfully administers any poison to domestic animals, the property of another, or maliciously exposes any poisonous substance, with the intent that the same shall be taken or swallowed by any such animal, shall be guilty of a crime and punishable by imprisonment in the state prison not exceeding three years, or in the county jail not exceeding six months, and a fine not exceeding five hundred dollars. Provided that nothing contained in this section shall apply to any officer or agent of the United States or the State of Arizona exposing poison to be taken by predatory animals, or any person exposing poison upon premises owned, leased, or controlled by him outside of cities, towns, or villages for the purpose of protection of such person or his property on such premises.

Poison to Kill Trespassing Animals

The owner or occupant of land has no right to kill an animal merely because it is trespassing on his land. If, then, he puts out poisoned food to destroy animals, and an animal is injured or killed, he becomes liable to the owner. This liability is not destroyed though he has previously notified the owner of the animal of his intention to distribute the poisoned food.

Readings: Poison for Trespassing Animals. Scattering Poison within One's Inclosure. *Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96.

Insecticide and Fungicide Laws

Not only the United States, but many of the states as well, have passed statutes to prevent the manufacture or sale of misbranded or adulterated insecticides and fungicides. Nearly all such state statutes require the disclosure of ingredients, forbid the use of specified drugs, require the name of the manufacturer or importer to be placed on the label, and define what acts shall constitute misbranding or adulterating.

The administration of these statutes is usually in the hands of the state board of agriculture. To make the proper supervision possible, it is often required that each manufacturer, im-

porter, and vendor of insecticides or fungicides register with the Secretary of Agriculture the name and number of each variety of such articles to be manufactured, imported or sold, furnish samples to be analyzed, and receive tags from the board.

State insecticide acts necessarily vary greatly, due to the diversity of trees, crops, and other vegetation sought to be protected. This is exemplified in the Georgia statute, which deals almost exclusively with destroyers of cotton pests.

A copy of the Federal Insecticide Act is included in part 2 of this book.

Readings: Insecticide.

1. Insecticide—Explosion—Customer Injured by Explosion of Insecticide. *West Disinfecting Co. v. Plummer* (1916) 44 App. D. C. 345.
2. Statute Prohibiting Use of Arsenical Sprays on Bearing Citrus Trees. *Maxcy v. Mayo* (1931) 103 Fla. 552, 139 So. 121.

Injuries Resulting from Misuse of Poisons

Clippings:

40 CHILDREN ARE BLINDED FOR LIFE IN TRAGIC MISTAKE

Cauterizing Fluid Is Sprayed Into Eyes of Students by Clinic Nurses

United Press.

Athens, Jan. 15.—Forty school children were made blind for life today through a scientific error.

The children had gone to the eye hospital at Kesarion, near here, to have their sight tested.

Attendants sprayed their eyes with a liquid.

The liquid proved to be a cauterizing fluid. The shrieks of the blinded children brought doctors on the run, but nothing could be done to save the victims' vision.

MOTHER'S MISTAKE FATAL FOR BABY ON RANCH NEAR PUEBLO

Pueblo, Colo., May 13.—Given a bottle of household antiseptic poison by her mother, thinking it was milk, Bettie Louise Howard, infant daughter of Mr. and Mrs. Frank Howard, ranchers 29 miles east of Pueblo, on the Santa Fé trail, died almost instantly Monday afternoon.

At the regular feeding time, the mother unwittingly reached for the poison instead of a bottle of milk she had prepared. A moment later the child was dead, according to Deputy Coroner Dennis McGuin, who investigated the tragedy.

DRINKING PARTY FATAL TO SEVEN

Anti-Freeze Solution is Consumed at Raton, N. M.

United Press.

Raton, N. M., March 19.—The death toll of a drinking party at which nine men consumed anti-freeze solution rose to seven today when Joe Vigil died.

Victims of the poison became blind, suffered great agony, then lapsed into unconsciousness before they finally died in a crude shack, where the drinking was done.

Two men who drank some of the mixture told authorities where it was purchased. Inasmuch as it was not sold for beverage purposes, it was doubtful charges would be filed, authorities said.

14 DRINKERS OF JAKE PARALYZED.

One Also Blinded by Poison Beverage on Coast

United Press.

Los Angeles, Feb. 3.—Fourteen cases of "jake paralysis" caused by drinking Jamaica ginger cooking extract were listed tonight by the city health department.

All 14 men were reported paralyzed. One also was blinded.

Enactment of an ordinance to force buyers of the extract to sign sales slips so that sources of supply may be checked in event of paralysis is being considered by the health department.

ARTHUR DRUGS

CHAPTER 7

SPECIFIC PROBLEMS OF THE RETAIL DRUGGIST

Specific Problems

In managing a drug store, a multitude of problems arise which call for careful consideration. Many of these have been presented in other chapters, but there are a number which do not readily lend themselves to any such classification. Among the specific problems included in this chapter are the question of identifying drugs, substituting drugs, recommending a drug for a specific purpose, and others. It is essential for a druggist to know his rights and duties along these lines.

Substituting Drugs

There are many drugs and preparations on the market the reactions of which under certain circumstances may be identical or least quite similar. A dangerous situation arises when a customer asks for a particular drug or preparation which the druggist does not have in stock. The druggist tells the customer that he has some other substance which is "just as good" or "will serve the same purpose." If the customer purchases the article so recommended, and if it differs in character or action from the drug requested, and if injury results therefrom, the druggist may be held liable on the theory that his conduct amounted to negligence.

The word "substitution" has a well-defined meaning among pharmacists and druggists, and is applied properly only to the use of a different drug in a prescription than the one called for without the consent or knowledge of the prescriber, or the delivery of a different drug than the one asked for without the knowledge and consent of the purchaser. Such substitutions are extremely rare.

Substituting Drugs in Prescription Unlawful

Statute: Whoever, engaged in the business of an apothecary, knowingly uses any drugs or ingredients in preparing or compounding a written prescription of any physician different from

those in the prescription, shall upon conviction thereof be punished by a fine of not less than five dollars, nor more than one hundred dollars. Me. Rev. St. 1930, c. 23, § 14.

Substituting a Drug for One Ordered by the Customer

Case:

DUNLAP v. OAK CLIFF PHARMACY CO.

Court of Civil Appeals of Texas, 1926. 288 S. W. 236.

Action for damages for personal injuries alleged to have resulted from negligence of defendant's clerk. The negligence charged was in the sale to her, when she called for Seilers Antiseptic Tablets, a nonpoisonous, alkaline, antiseptic tablet, of Diamond Antiseptic Tablets, a highly poisonous bichloride of mercury tablet.

About July 9, 1924, appellant (plaintiff), a girl then about 20 years of age, went with her father to one of appellee's drug stores and asked for Seilers Antiseptic Tablets. According to her testimony and that of her father, the druggist made a search for same and was unable to find them, and returned to appellant, who was seated at a table in the store, saying that he had no Seilers tablets, but that he had Diamond Antiseptic Tablets, and presented her with a bottle containing six tablets. The appellant then asked the druggist if they were the same, or practically the same, as the Seilers, to which he answered "Yes." According to her testimony, this is substantially all that occurred at the time. The druggist did not know what use she expected to make of these tablets. She used them in her vagina, with the result that she received bichloride of mercury poisoning and suffered intense pain and bodily injuries with near fatal results.

Question: Is a druggist negligent, if he represents that a drug substituted by him on a sale, is identical to the one called for by the customer, in the event that injury results from such substitution?

BAUGH, J. In the absence of mitigating circumstances, the sale by a druggist to a customer, who calls for a harmless soothing, alkaline, nonpoisonous, antiseptic tablet, of a highly poisonous, mercurial, antiseptic tablet, with the representation to the purchaser that they were the same or practically the same, when such druggist knew the constituent elements of both tab-

lets, raises a question of negligence, if indeed it does not make a *prima facie* case of negligence as a matter of law.

Review of Dunlap v. Oak Cliff Pharmacy Co.:

1. What negligence was charged?
2. Did the druggist inquire into the use to be made of the drug?
3. What question is involved?
4. What is meant by mitigating circumstances?
5. What is meant by a *prima facie* case of negligence?
6. Formulate a rule for the case.

Substances Purported to be Identical

Among risks which must be assumed by a druggist, that of quickly identifying drugs or compounds, or of determining that certain substances are identical or similar, presents great hazard. It is so easy to make a mistake from which trouble may arise. In most cases an error as to identity of drugs or similar substances falls directly back upon the druggist, and it is necessary for him to know exactly what a substance is before selling it to relieve himself of liability for injuries arising from his lack of accuracy.

Druggist Made a Mistake in Identifying Drugs

Case:

ANDREOTTALA v. GAETA.

Supreme Judicial Court of Massachusetts, 1927. 260 Mass. 105, 156 N. E. 731.

The plaintiff, an illiterate shoemaker, went to defendant's pharmacy and asked for something to relieve his cough, and one Constanza, a clerk, prepared and sold to the plaintiff a bottle containing a brown liquid, which had the ordinary label of the pharmacy with the words, "Creo. Turp. Virg. Acqa," and directions for taking the contents. It, however, contained no codeine or other narcotic. Later the plaintiff consulted Dr. Cohen, who gave him a prescription. The plaintiff on reaching his home gave this prescription with a \$2 bill to a messenger, and instructed her to go to the defendant's pharmacy and have the prescription filled, but he also suggested that the bottle of medicine previously purchased should be taken to the pharmacy, and instructed the messenger to inquire if the prescription "was the same thing,

and if not the same thing to have the prescription filled." The messenger did as instructed, and Constanza, after examining the bottle and the prescription, said "that the medicine contained in the bottle was the same as that called for by the prescription, and that there was no need to have the prescription filled, and told her further to tell that to the plaintiff, and to tell him to take the medicine." The plaintiff took several doses of the medicine, but his cough having increased, accompanied by fever and chills, he was compelled to leave his work and returned home and went to bed. Dr. Cohen was called and found him suffering from bronchitis, "severely aggravated, incipient pulmonary abscess and destruction of living tissue," which condition had been developing more than twenty-four hours when Dr. Cohen was consulted. The medicine prescribed "was a light pink color," and the plaintiff's medical expert testified, and it could be found, that the lack of codeine, which was the operative ingredient of the prescription, from the time the messenger returned with the unfilled prescription and the bottle of medicine which the plaintiff took until the following afternoon, when the doctor discovered that the plaintiff had not had the prescription filled, "aggravated his condition and caused the injuries complained of."

Question: Might it constitute negligence for a pharmacist to represent that a cough medicine sold by him was the same as that called for by a doctor's prescription?

Held: The judge also rightly declined to order a verdict for the defendant on the third count which rests upon the alleged representations of the defendant, that the compound in the bottle as to its medicinal ingredients was the same as those called for in the prescription.

The representations were not gratuitous, as the defendant contends. They were part of the negotiations for a proposed purchase and sale which Constanza was authorized to make, and proof of actual knowledge by him that the representations were false, and that he intended to deceive the plaintiff, was unnecessary. The affirmative statements of Constanza, the jury could find, under instructions to which no exceptions were taken, were made not as matter of opinion, or as an estimate of judgment, but were based on his expert knowledge of drugs, and their therapeutic value and effect. [The jury found that the representations made by the druggist constituted negligence, so the plaintiff recovered damages.]

Review of Andreottala v. Gaeta:

1. What mistake was made?
2. What was the question?
3. Why did the judge decline to order a verdict for the defendant?
4. Why were the representations of the clerk not gratuitous?
5. State the holding of the case.

Drug Recommended and Sold for a Particular Purpose

A customer may request a drug for a specific purpose, which purpose he explains to the druggist, and then leave it to him to select and prepare the proper remedy. If the drug or medicine is to be used for medicinal purposes, and if the selection and preparation of it calls for professional skill and knowledge, the druggist, by accepting the order and attempting to fill it, impliedly represents that the drug is suitable for the purpose for which it was requested and supplied. The fact that the label on the container of the drug does not specify that it is fit for the purpose for which it is purchased is no defense if it is actually sold as suitable, and the druggist may be held liable for the damages resulting, if his mistake was the proximate cause of the injury.

Warranty of Druggist Who Sold Drug for Specific Purpose When the Particular Drug was Called for by the Customer

Case:

GOLBERG v. HEGEMAN & CO.

Supreme Court of New York, Appellate Term, 1908. 60 Misc. 107,
111 N. Y. S. 679.

Personal injury action. The plaintiff informed the defendant's clerk that he wished to purchase "ten cents worth of corrosive sublimate to apply to the body to kill lice." The clerk asked the plaintiff if he should mix it with water or alcohol, and the plaintiff replied that he did not know. The defendant furnished the plaintiff with ten cents worth of corrosive sublimate. The plaintiff applied it to his body, and sustained severe injuries as a result.

Question: If a customer asks a druggist for a certain drug for a particular specified purpose and the druggist furnishes the drug called for, does he impliedly represent that the drug sold is suitable for the purpose?

SEABURY, J. The plaintiff predicates the charge of negligence upon the claim that, as he asked for corrosive sublimate "to apply to the body to kill lice," the defendant should have so prepared the corrosive sublimate that it could be applied to the body without injuring it. The plaintiff offered the evidence of a physician to the effect that corrosive sublimate could be so prepared that it could be applied to the body without injurious consequences. The physician also testified that the drug furnished the plaintiff was "a very strong solution," and that "it was of abnormal strength." The case at bar is not, as contended by the appellant, a case where a customer ordered a drug and was given the drug he ordered. If it were such a case, we think that there could be no recovery. Here the plaintiff asked for a drug for a particular specified purpose, and when the defendant sold him a drug for this purpose it thereby impliedly represented the drug which it sold to be suitable for the purpose for which it was sold. The plaintiff used it for the purpose for which the defendant had sold it to him, and thereby sustained injury.

It is true that in the present case the druggist put no label upon the drug; but in attempting to fill the plaintiff's order the defendant, by the actions of its agent, declared the drug to be fit for the purpose for which he sold it, just as clearly as if he had labeled it as fit for this purpose.

Review of Goldberg v. Hegeman & Co.:

1. Why was this a personal injury action?
2. What alleged mistake caused the injury?
3. Did it make any difference that the customer named the drug he desired?
4. State the question in your own words.
5. Why is there a special duty imposed on a druggist when the customer states the purpose for which he is buying the drug?
6. On what theory of the law did the plaintiff recover?
7. State the rule of law.

Readings: Duty of Druggist When Drug Sold for a Particular Purpose. *Hair Wash. George v. Skivington* (England, 1869) *Law Reports*, 5 Exch. 1, 21 *Law Times* 495, 18 W. R. 118.

On Sale of Compound Druggist Made Special Warranty and was Liable for Breach of Contract

Digest of Case:

A druggist represented the contents of a bottle sold to be genuine sweet oil of standard purity, and warranted it in these words: "It is pure sweet oil; I will guarantee it." The drug sold was rancid cotton seed oil and not of standard purity. Held, the druggist liable and that the administrator of the child whose death resulted could sue on the contract for damages. *Spry v. Kiser* (1920) 179 N. C. 417, 102 N. E. 708.

Defense That the Injured Customer was Unusually Susceptible

Often, in cases in which a druggist is being sued because of injury to one of his customers through the use of some article purchased at his store, he sets up the defense that the plaintiff was unusually susceptible to the drug. By this is meant that the person suing had some disease or some bodily condition which caused the drug in question to have a different or more intense effect than that to be expected under ordinary conditions. The plaintiff can set up a defense that this is not true. The following case is in point:

The plaintiff had a sprained ankle and purchased arnica from the defendant, and, when used, it caused her great pain and suffering. The plaintiff claimed that the arnica was impure and contained some harmful ingredient. The defendant offered evidence tending to show that some persons, under some circumstances, have a tender skin that would be affected, on the application of arnica, in the manner claimed by the plaintiff. To meet this testimony the plaintiff offered evidence that during the trial she had purchased a bottle of arnica from the defendant and applied it to her skin in the same manner, and that she had not been injured thereby. If the defendant is permitted to introduce the defense of tender skin, then the plaintiff should be permitted to meet the defense, and the manner chosen by her was permissible. *Machlitt v. Myers* (1926) 23 Ohio App. 160, 155 N. E. 248.

Defense—Improper Care or Treatment after Injury

If the liability of the druggist has been incurred by his own misconduct or negligence, the subsequent negligence of the injured person which aggravates the injury already received does not discharge the druggist from liability. Nevertheless, such facts usually may be shown in mitigation of damages. It is not proper to call this later negligence of the injured party contributory negligence, for that implies that both parties exercised their negligence at the same time. This is subsequent negligence which aggravates the injury already existing because of the prior negligence of the druggist.

Improper Treatment of Injured Person as a Defense

Case:

BROWN v. MARSHALL.

Supreme Court of Michigan, 1882. 47 Mich. 576, 11 N. W. 392,
41 Am. Rep. 728.

Marshall sued Brown to recover damages for a negligent injury. The plaintiff being confined to her bed by illness and desiring to take sulphate of magnesia or Epsom salts as a medicine, sent her sister to the store of defendant to procure the salts for her. The sister called for 10 cents' worth of Epsom salts, and a clerk delivered to her what he said was the article called for, remarking at the time, in explanation of an unusual appearance, "It is pure salts, but it is a little dark from exposure." The article was taken to plaintiff, who dissolved the same in water and took a portion thereof. She immediately felt a burning sensation and was very sick, and, suspecting something wrong, remedies were at once given as for poison. What remained of the article she had thus procured was afterward examined and found to be sulphate of zinc or white vitriol.

The defendant insisted that the subsequent treatment of the plaintiff with a view to relieve her of the drug was improper and well calculated seriously to injure her, and he relied upon this treatment as evidence of contributory negligence.

Question: In an action against a druggist for injury caused by negligence of his clerk in selling sulphate of zinc for Epsom salts, is it a defense that the medical treatment was negligent?

COOLEY, J. [The defendant had made requests for several instructions, which were refused.] What the requests do suggest is, that if the defendant causes an injury to the plaintiff, and the plaintiff afterwards increases the injurious consequences by his own fault or the fault of his agents or servants, this blame-worthy contribution to the injury takes away any right of action for the defendant's fault which otherwise would have existed. The contributory negligence then comes in, not to prevent a cause of action arising but to discharge one that has already arisen.

No such doctrine is consistent with good sense or sound law. A tort arises when there is a thing amiss with resulting damage. If the drug was negligently sold, as is charged in this case, and was subsequently taken by the plaintiff without fault on her part or on the part of any one whose act in administering it is to be imputed to her, these facts constitute that necessary concurrence of wrong and damage which will support an action. It is not necessary to inquire into the subsequent treatment of the case in order to determine the question of legal wrong. A heedless attendant cannot release the defendant from his responsibility by neglecting his own duty, nor can the physician do so by treating the case improperly. But the question of the extent of the injury which is traceable to the defendant's negligence is another matter altogether. To judge of that it is necessary to inquire into the care and treatment which the plaintiff subsequently received. If it shall appear that the injury to the plaintiff's health is traceable not to the drug itself, but to improper treatment of want or due care after it was taken, it will then be obvious that the plaintiff's injury at the hand of the defendant is merely nominal. The question will then become one of damages only, and must be disposed of by the jury.

Review of Brown v. Marshall:

1. State briefly the facts of the alleged mistake.
2. Did it make any difference that the drug was purchased by the sister of the plaintiff?
3. What defense was urged by the defendant?
4. Why was there no contributory negligence?
5. State briefly the question.
6. What is meant by a tort?
7. For what purposes could evidence of improper treatment after injury be introduced?
8. State the holding of the case.

Can a Druggist be Held for Negligence if a Person Helps Himself to a Drug Which Causes Injury

Case:

GWYNN v. DUFFIELD.

Supreme Court of Iowa, 1885. 66 Iowa, 708, 24 N. W. 523,
55 Am. Rep. 286.

The evidence shows that the defendants, H. P. Duffield and S. B. Duffield, were partners in business as apothecaries; that the plaintiff went into their store and called for the extract of dandelion; that S. B. Duffield undertook to put up for him a quantity of the drug called for; that in doing so he made a mistake and put up the extract of belladonna and delivered the same to the plaintiff; that none of the drug, however, thus put up and delivered was swallowed by the plaintiff, and it is not claimed any liability arose by reason of such sale and delivery; that the dose which produced the injury was not put up by the defendants, or either of them, nor was it delivered by the defendants, or either of them, to the plaintiff; that the plaintiff helped himself to the same from a jar standing upon the defendant's counter; that the jar had been taken from the shelf by S. B. Duffield and placed upon the counter, and the drug put up was taken from that jar, by him, under the mistaken supposition that it was the extract of dandelion.

Question: Whether the druggist is liable for injury occasioned where the purchaser helps himself to the drug, even in the presence of the druggist, although he was mistaken as to the identity of the drug taken.

ADAMS, J. The plaintiff testified, in effect, that he took the drug under the permission of S. B. Duffield. The latter denied that he gave such permission. If he is to be believed, the plaintiff was a trespasser; and, if a trespasser, he cannot be allowed to set up his own ignorance and say that he relied upon S. B. Duffield's knowledge and was misled by his mistake. The instruction precluded the consideration of the defendants' theory of the case, which was supported by evidence that the jury might have believed. That a person trespassing upon the property of another cannot recover for an injury sustained through the negligence of the owner in respect to such property, unless the negligence was wanton, or evinced an indifference to the safety of others, appears to us to be well settled.

Review of Gwynn v. Duffield:

1. State the facts of the case.
2. What was the question involved?
3. Why was the plaintiff a trespasser?
4. When can a trespasser recover for a personal injury?
5. Why was it immaterial that the druggist had filled the prescription out of the wrong container?
6. Why is this an unusual situation?
7. State the rule of law of the case.

Druggist Sold Carbolic Acid to Minor Who Purchased as Agent for His Father

Case:

RIESBECK DRUG CO. v. WRAY.

Appellate Court of Indiana, 1930. 94 Ind. App. 615, 170 N. E. 862.

This is an appeal from a judgment in the sum of \$5,000, entered upon a complaint filed by Mary G. Wray, administratrix of the estate of Norman E. Wray, claiming damages alleged to have been sustained by reason of the death of Norman E. Wray, caused by the alleged negligence of appellant, Riesbeck Drug Company, in selling carbolic acid to the minor child of the said Norman E. Wray, the child having thereafter delivered the acid to the said Norman E. Wray, who drank it and died as a result thereof. Mrs. Wray testified the first she knew there was anything wrong was when her husband called her into the bedroom from the kitchen, and she learned he had sent his son Russel Wray, 8 years old, to the drug store for a bottle of carbolic acid. She did not know that the boy had gone to the drug store, and did not know her husband had the acid until just as she entered the room he was drinking the acid, and then he dropped over and became unconscious and died. She testified she had never authorized the drug store to sell her children carbolic acid, and did not know whether the drug store knew her husband or not. A clerk testified that the bottle had a poison label on it, the same poison label that is put on bottles when they are put up; the label being printed in red.

There is no law in the state of Indiana making the sale of carbolic acid to a minor unlawful, and there is no rule of the state board of health or any of its agents making such an act unlawful.

Question: Under the above statement of facts, if the father sent his son, 8 years old, to the drug store to purchase carbolic acid and if the drug when sold was properly labeled, was the drug company liable if the father used the drug as a means to take his own life?

LOCKYEAR, J. The boy was the agent of the father in the procurement of the acid. If the father had sent a man of full age to procure the acid, it would not have changed the legal aspect of this case. The sale of the acid was not the proximate cause of the decedent's death. There is no evidence to show sanity or unsoundness of mind. The drinking of the acid was the proximate cause of death, and it does not matter how the poison was procured.

Norman E. Wray was a man of full age, a free moral agent; he could have used the acid to wash his feet, drink it, or do anything he pleased to do with it. He chose to drink it; and neither the appellant nor this court could have kept him from doing so. The verdict is not sustained by the evidence.

Review of Riesbeck Drug Co. v. Wray:

1. What sum had been recovered on the former trial?
2. Why was the plaintiff suing as administratrix?
3. On what ground did the plaintiff assume that the defendant should be held liable?
4. What was the exact mistake complained of?
5. Why was it material that the boy was the agent of the father?
6. Why was the sale of the acid not the proximate cause of the injury?
7. State the rule of law.
8. Does this case suggest the advisability of a statute?

Formula or Trade Secrets—Must Witness Disclose

If a druggist is on the witness stand and is asked a question the answer to which would disclose trade secrets or the contents of a formula, has he a right to refuse to answer the question? The general rule is that a witness has no absolute privilege to refuse to disclose such secrets, but the court has power to protect him from an examination into such secrets, when the answer is not actually necessary, and especially when it would be injurious

to his business. As stated, there is no absolute privilege, so, if the interests of innocent third parties are involved, or if failure to answer would aid in perpetrating a fraud, a disclosure will be enforced. Even in cases where the court compels disclosure, precaution is taken to protect the secrets as much as possible. Disclosure may be made to the judge only, or to a trusted person appointed by him. It is not the policy of the law to attempt to secure valuable trade secrets from a witness under cover of court proceedings, so, unless the interests of justice are involved, the witness will not be compelled to disclose such secrets.

Readings: Witness on Stand—Requested to Disclose Trade Secrets.

1. Trade Secrets. Wigmore on Evidence, § 2212.
2. When Fraud Involved. *Stuckes v. National Candy Co.* (1911) 158 Mo. App. 342, 138 S. W. 352.
3. No Absolute Privilege. *Willson v. Superior Court of Los Angeles County* (1924) 66 Cal. App. 275, 225 P. 881.
4. Trade Secrets in Court. *Stone v. Grasselli Chemical Co.*, 65 N. J. Eq. 756, 55 A. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794.
5. Disclosure of Trade Secrets. 41 Yale Law Journal, 144-146.
6. Cross-Examination as to Trade Secrets. *Moxie Nerve Food Co. v. Beach* (C. C.) 35 F. 465.
7. When Question of Unfair Competition. *Coca-Cola Co. v. Joseph C. Wirthman Drug Co.* (C. C. A. 1931) 48 F.(2d) 743.

Privileged Communications

Most people, perhaps all, have secrets which they would not care to have published to the world. But any friend or business associate in possession of such secrets might be called upon to reveal them from the witness stand. Even the fact that such secrets have been given to him in confidence does not seal the lips of one called upon to testify in court. However, there are a few exceptions to this rule. A physician in his professional capacity finds out many things about the life, habits, and physical and mental conditions of his patients. Usually a physician may not, without the consent of his patient, give evidence in a suit concerning secrets learned in the performance of his pro-

fessional services. Many people reveal secrets to druggists, but it is well to know that anything disclosed to a druggist or dentist is not privileged, and either may be compelled when on the witness stand to disclose all such communications. Likewise, a druggist may be obliged to testify as to the drugs and medicines he has prepared and furnished to one of the parties to a suit.

Communications to Druggist Not Privileged

Digest of Cases on Privileged Communications:

In an action for damages for seduction, a druggist was called as a witness for the plaintiff and was permitted to testify that the defendant called on him and asked him, "What can be done for a young lady that is in a fix?" and he told the defendant to marry the girl. This testimony was admitted on the theory that communications to a druggist are not privileged. *Badder v. Keefer* (1892) 91 Mich. 611, 52 N. W. 60.

Readings: Druggist on Witness Stand may be Compelled to Disclose Facts Related by Customers.

1. Knowledge Which Druggist Obtains from Customer Not Privileged. *Brown v. Hannibal & St. J. R. Co.* (1877) 66 Mo. 588.
2. Druggist Filling a Prescription may be Compelled to Testify to the Fact. *Deutschmann v. Third Avenue R. Co.* (1903) 87 App. Div. 503, 84 N. Y. S. 887.

Injury to Employee—Master's Liability

Personal injuries to employees are the cause of much litigation and trouble between employers and employees. In case of an accident resulting in injury to an employee, one of the first questions to arise is, whether the employer is liable. If the injury results from the intentional or willful act of the employer, he is, without doubt, liable. In fact, under like circumstances the offender would be liable although the relationship of employer and employee did not exist.

It is somewhat difficult to determine for what accidents to an employee, in and around the premises, and apparently within the scope of his employment, the employer is liable, when such injury does not result from the latter's personal act. A number of facts must be shown to establish liability. The relationship

of employer and employee must exist; the injury must have occurred while the employee was in the course and scope of his employment; the negligence of the employer must be clearly established. Then the liability of the employer is often affected by the doctrine of assumed risk, the fellow-servant rule, or by contributory negligence on the part of the employee.

Under the common law, the rules and regulations governing such liability were complex and unsatisfactory, but to-day there are many statutes which regulate the liability of the employer for accidents to his employees. All employers should be familiar with the Employer's Liability Acts of their state, as well as the Workmen's Compensation Acts.

Employee Injured by Bursting Bottle of Beverage

Case:

LEHMAN v. VAN NOSTRAND.

Supreme Judicial Court of Massachusetts, 1896. 165 Mass. 233,
42 N. E. 1125.

Action by F. W. Lehman for personal injuries.

- Questions:*
1. If it appeared that, shortly before the plaintiff was injured, several other bottles had burst, to his knowledge, did the employee by continuing to work, assume the risk?
 2. If he assumed the risk, is recovery from his employer defeated?

ALLEN, J. The injury to the plaintiff resulted from the bursting of a bottle of ale, while he was engaged in packing ale for the defendant. There was evidence tending to show that the ale was too lively to be handled with safety, and was likely to cause the bottles to burst. The plaintiff had been at work for the defendant about 10 days. Before that, he had had a large experience in packing sweet beers, ale, and lager in champagne bottles, but had never seen a bottle of ale explode like that which caused the injury to him until the day of the accident. On that day, two bottles had previously exploded, and he knew that this was because the ale was in too lively a condition; and, before he was injured, he knew there was danger in handling the bottles and packing them. The accident to the plaintiff happened about an hour afterwards. The plaintiff needed no more instruction to inform him that there was danger, and in fact he knew and

appreciated the risk, and must upon his own statement be held to have assumed it; and, in the opinion of a majority of the court, the defendant was entitled to an instruction to the jury accordingly.

Review of Lehman v. Van Nostrand:

1. Explain the legal consequences of "assumed risk."
2. How was Lehman injured?
3. Was he an experienced employee?
4. What legal consequences attached to the fact that two bottles had exploded just prior to the one that caused the injury?
5. Apparently, was the plaintiff fully aware of the dangers existing in his employment?
6. Do you consider the doctrine of assumed risk a harsh rule of law?

Readings: Liability of Employer for Injury to Employee.

1. Fitzgerald v. Brooklyn Institute of Arts & Sciences (1916) 175 App. Div. 554, 162 N. Y. S. 625.
2. Omaha Bottling Co. v. Theiler (1899) 59 Neb. 257, 80 N. W. 821, 80 Am. St. Rep. 673.
3. Liability for Injury to Employee by Robbers. 29 Law Notes, 153, 154.

Aiding or Abetting Suicide

Centuries ago it was perfectly legal to commit suicide, and later both Greeks and Romans established courts to determine whether applicants should be permitted to commit suicide or not. And even to-day it is very seldom that the person who makes an unsuccessful attempt to commit suicide is punished criminally. Blackstone states that by the early common law of England suicide was ranked among the infamous crimes and held to be a "species of felony." It was punished by a forfeiture to the king of the goods of the *felo de se* and an ignominious burial in the highway with a stake driven through his body.

But if two persons mutually agree to kill themselves, and if the effort results in the death of one only, then it is generally the law that the survivor may be prosecuted for the murder of the one who dies. In *People v. Roberts* (see readings) it was held "That one mixing poison and placing it within reach of an intended suicide, at the latter's request, is, in case it is taken and

death ensues, guilty of murder by poison, although suicide is not a crime."

"It is beyond my comprehension how a human being, of normal conditions at least, or apparent normal conditions, can commit such a crime as you have in this case, by placing poison within the reach of your wife with the intention as you claim. It doesn't make any difference whether she had that intention or not of committing suicide. You are a principal, under the law of the state committing the crime of murder. It was, indeed, an inhuman and dastardly act. The sentence of the court is that you be confined to the state's prison, located at Marquette, for the period of your natural life, at hard labor, and in solitary confinement."

Readings: Aiding, Abetting, or Permitting Suicide.

1. Liability for Permitting Suicide. 30 Law Notes, 81.
2. Status of Suicide as a Crime. 12 Law Notes, 188.
3. Criminal Liability of an Inciter or Abettor of Suicide. 61 Central Law Journal, 406-409.
4. Suicide and Law. 10 Green Bag. 141-145.
5. Providing Poison for Suicide. Blackburn v. State (1872) 23 Ohio St. 146.
6. Mixing Poison for Suicide. People v. Roberts (1920) 211 Mich. 187, 178 N. W. 690, 13 A. L. R. 1253.
7. Failure to Restrain One from Committing Suicide. Rex v. Sidney, 20 Can. Crim. Cases 376.
8. Inducing One to Take Poison. Sanders v. State (1908) 54 Tex. Cr. R. 101, 112 S. W. 68, 22 L. R. A. (N. S.) 243.
9. Accessory before the Fact. Commonwealth v. Hicks (1904) 118 Ky. 637, 82 S. W. 265, 4 Ann. Cas. 1154.
10. An Infamous Crime at Common Law. 4 Blackstone's Commentaries 189.
11. Attempt to Commit Suicide Not a Crime. May v. Pennell, (1906) 101 Me. 516, 64 A. 885, 7 L. R. A. (N. S.) 286, 115 Am. St. Rep. 334, 8 Ann. Cas. 351.

CHAPTER 8

PATENT AND PROPRIETARY MEDICINES

Patent or Proprietary Medicines

The promotion of public health is one of the big problems of the state. Through legislative enactments, the state can regulate the sale of patent or proprietary medicines as a means of protecting the lives, health, and property of its citizens. Some of the statutes regulating the sale of drugs and medicines expressly provide that they do not apply to the sale of patent or proprietary medicines, while others which forbid any person other than a recognized pharmacist to retail, compound, or dispense drugs, medicines, or poisons have been held to include patent and proprietary medicines. There is not the same necessity for requiring the services of a skilled pharmacist in the sale of patent or proprietary medicine as for the retailing of drugs and the compounding of physicians' prescriptions. The manufacturer of patent medicines usually compounds them carefully and uniformly and places them in containers properly labeled and marked with directions for use. There is, therefore, little or no opportunity for the retailer to make any error in the sale of such articles as he might make in dispensing other drugs, medicines, or poisons.

Proprietary Medicine Defined

In *Tiedje v. Haney*, 184 Minn. 569, 239 N. W. 611, quoted elsewhere, the court stated that the word "proprietary" as applied to medicines implies that the compound has been prepared by a manufacturer according to his own formula, though it is not necessary for the formula to be the exclusive property of the maker or that the process be secret. It may have a character of its own secondary to the reputation of the manufacturer and the nicety with which it is prepared. A medicine cannot be considered proprietary unless the original package in which it is contained bears the name of the manufacturer.

Liability of Druggist in Selling Patent or Proprietary Medicines

If a customer calls for a patent or proprietary medicine, and the druggist delivers the medicine called for, in the original package, accompanied by the directions of the manufacturer for its use, the druggist is not liable for injury that may result from its use. The fact that he is vendor of the drug does not bind him to analyze the contents of the package. If, on the other hand, the druggist should have knowledge of the ingredients and know them not to be as represented or that any danger was involved in the sale of the patent medicine, his failure to protect the customer might constitute negligence. The fact that the retailer is not liable does not relieve the manufacturer from responsibility. Some states have made the status of the retailer clear by passing statutes relieving him from liability for injury resulting from the sale of patent or proprietary medicines on compliance with certain conditions.

Liability of Druggist on Sale of Patent Medicine

Case:

WEST v. EMANUEL.

Supreme Court of Pennsylvania, 1901. 108 Pa. 180, 47 A. 965,
53 L. R. A. 329.

An action to recover damages for the death of the plaintiff's daughter, which was alleged to have been caused by a headache powder sold to her by defendant.

It appeared from the evidence that plaintiff's daughter, Edna West, was suffering with headache; that she went to defendant's drug store, and purchased a Kohler's headache powder. She immediately returned home and took the powder between 6 and 7 o'clock in the evening. Shortly after retiring she was discovered by her mother and sister to be in distress and to be unconscious. Their efforts to arouse her proving fruitless, they sent for physicians, who were also unable to afford relief, and she expired about half past 10 in the evening.

Question: Is a druggist guilty of negligence in selling to customers proprietary medicines in the package and under the label of the proprietor, without making an analysis of the contents?

PER CURIAM. At the close of the plaintiff's case, and on motion of the defendant, the court entered a compulsory nonsuit, which, on application of the plaintiff, it refused to take off. As the evidence introduced by the plaintiff failed to establish or disclose a cause of action against the defendant, the nonsuit was properly entered. The Kohler Headache Powders were in demand at least 12 or 15 years ago, and from that time on they were to be found for sale in most, if not all, of the principal drug stores. They were recognized and regarded as an efficient and proper remedy for headaches, and were mainly used to relieve them. They were a patent or proprietary medicine, manufactured by Kohler, and sold by him to the drug stores, which sold them to their customers. In the sales of patent or proprietary medicines furnished by the compounder of the ingredients which compose them the druggist is not required to analyze the contents of each bottle or package he receives. If he delivers to the consumer the article called for with the label of the proprietary or patentee upon it, he cannot be justly charged with negligence in so doing. Judgment affirmed.

Review of West v. Emanuel:

1. State the important facts.
2. What question was involved?
3. Why was the defendant not liable?
4. What is the liability of a retail druggist on the sale of patent medicines?
5. State the law of the case.

Original Package—Wrong Package Delivered

In some states there are laws to the effect that a druggist is not legally responsible for injuries resulting from the use of an article when it is sold to the customer in the original package. This rule applies only when the druggist delivers the package called for. If, instead of the package ordered, he delivers some other drug in its original package from which injury results, the above rule does not protect him. This is illustrated clearly in the recent case of *Martin v. Bartell Drug Co.* (1930) 155 Wash. 317, 284 P. 96, in which the customer ordered a box or carton of one hundred tetrachlorethylene pills for his foxes, but was given a carton of one hundred carbon tetrachloride pills, with the result that eight of his foxes died. The customer was awarded damages in the sum of \$3,000. The rule of liability ap-

plies to delivery of drugs in the original package whether patented or not.

Readings: Mistake in Sale or Improper Use of Patent Medicine.

1. Druggist did Not Deliver Patent Medicine Requested. Kelly v. Ross, 165 Mo. App. 475, 148 S. W. 1000.
2. Patent Medicine Misused. Young v. Parke, Davis & Co., 49 Pa. Super. Ct. 29.

Proprietary Medicine—Legal Risk if Retailer Sells as Own Product

When a druggist sells tablets or medicine with the statement that they are prepared for him, he assumes a liability equivalent to that of a manufacturer. In a recent Minnesota case the court said: "But where the druggist obtains from a manufacturer tablets or medicine which he does not sell under the name of the manufacturer, but under his own name, accompanied by a statement that it was manufactured or prepared for him, in our opinion, the druggist assumes a responsibility equivalent to that of the manufacturer of the drugs." Justice Loring in Tiedje v. Haney (1931) 184 Minn. 569, 239 N. W. 611.

Readings: Liability of Druggist for Sale of Patent Medicines. Retailer Liable When Guilty of Negligence. Willson v. Faxon, Williams & Faxon (1913) 208 N. Y. 108, 101 N. E. 799, 47 L. R. A. (N. S.) 693, Ann. Cas. 1914D, 49.

Restricting Sale of Patent and Proprietary Medicines to Registered Pharmacists

There is much diversity of law among the several states concerning the restriction of the sale of patent or proprietary medicines to registered pharmacists. In one group of states, statutes have been enacted the operation of which restricts the sale of patent and proprietary medicines and also medicines sold in the original packages of the manufacturer to licensed pharmacists. The Supreme Courts of a number of the states have held these statutes constitutional, while in other states the opposite view is held. It is interesting to note some of the arguments on either side of the contention. Proponents for the con-

stitutionality contend that police power extends to all regulations affecting the lives, health, comfort, morals, and safety of society; that police power should be sustained if it has a tendency to accomplish its object; that a pharmacist should be present at the sale of any drug to give advice and information if requested; and that because no technical skill is required to sell such medicines is no reason for holding the statute invalid. On the other hand, a number of state courts have held these acts unconstitutional and hence invalid on the grounds that such a statute is not a proper exercise of police power, that it is unreasonable and does not tend to promote public health in the slightest unless a druggist is required to make an analysis of the contents of the package, and that such a statute tends to grant a monopoly to a special class.

Statute Controlling Sale of Patent or Proprietary Medicines

Case:

STATE v. WOOD.

Supreme Court of South Dakota, 1927. 51 S. D. 485, 215 N. W. 487, 54 A. L. R. 719.

P. E. Wood was charged in a criminal complaint with unlawfully, wrongfully, and willfully selling certain drugs and medicines, not being a registered pharmacist or physician at the time, to wit:

"One bottle of Watkins' Lax-Tone, and one bottle of Watkins' Pain-Oleum, contained in original package, as put up by the manufacturer."

The complaint was formed under section 7743, Rev. Code 1919, which in part reads:

"It shall be unlawful for any person other than a registered pharmacist to retail, compound, or dispense drugs, medicines or poisons * * * except as herein provided." The exception refers to physicians.

Question: Was this act constitutional in so far as it applied to patent or proprietary medicines?

BURCH, J. Unless the sale of such medicines by pharmacists is regulated, then requiring such sales to be made by pharmacists does not regulate their sale, but merely gives to a class

the exclusive right to make unregulated sales of such medicines. Unlimited and unregulated sales by pharmacists may be just as extensive and quite as harmful as unlimited sales by others. Are pharmacists controlled and regulated by law in the sale of such medicines, where others are not? If so, and the regulations are sufficiently strict to afford real protection to the public, then this law may be sustained. * * *

The practical operation of the law restricting the sale of drugs and medicines compounded and dispensed by local pharmacists to sale by a pharmacist results in practically all of such sales being made by the one who compounds or dispenses them. Thus he knows their contents, strength, and purity, and is responsible for their effect, under the ethics and regulations of his profession. In the practical operation of the law the public is protected, by confining the sale to those having actual first-hand information. In the sale of patent medicine, no sale is likely to be made by the pharmacist who compounded the medicine. In the practical operation of the law, nothing is gained by the restriction of such sale to pharmacists, if they are in no way required to exercise any knowledge or skill, or to protect the public in any way by refusing to sell where harm will result. * * *

A police regulation for the protection of the public health will be sustained, if by any fair construction it has a tendency to effect its object. We have therefore sought earnestly for a valid reason to sustain the law, and to that end have considered the reasons advanced in the briefs of appellant and of the *amicus curiæ*, and have searched the statutes and the reported cases for a valid reason. We are unable to find in the statutes of this state anything which controls the sale of patent and proprietary medicines when made by pharmacists. Their right to sell such medicines seems to be unrestricted. No knowledge of their ingredients is required. We find nothing which requires druggists to warn the public against any danger in their use, or to assume any responsibility in their sale, or to do anything to protect the public in return for intrusting to them the sale of such medicines. Nor have any regulations of the Board of Pharmacy requiring anything of the druggists been called to our attention which can be said to even tend to added security of the public in buying such medicines of druggists. If the druggist does know the ingredients, he is not required to use such knowledge and need not be of any assistance; if he does not know them, he cannot be of any assistance. * * *

Such restriction is therefore unreasonable, and not a proper exercise of the police power of the state.

The judgment appealed from is affirmed.

Review of State v. Wood:

1. Why was this a criminal action?
2. What was the alleged offense?
3. What statute was quoted?
4. Why was the act held unconstitutional?
5. Why is nothing gained by restricting the sale of patent medicines to pharmacists?
6. Why is such a restriction unreasonable?

Readings: Restricting Sale of Patent and Proprietary Medicines to Registered Pharmacists.

1. The Statutes are Constitutional and Valid.
 - (a) *In re Gray* (1929) 206 Cal. 497, 274 P. 974.
 - (b) *State v. Kumpfert* (1905) 115 La. 950, 40 So. 365.
 - (c) *State Board of Pharmacy v. Matthews* (1910) 197 N. Y. 353, 90 N. E. 966, 26 L. R. A. (N. S.) 1013.
 - (d) *State v. Foutch* (1927) 155 Tenn. 476, 295 S. W. 469, 54 A. L. R. 725.
 - (e) *State v. Heinemann* (1891) 80 Wis. 253, 49 N. W. 818, 27 Am. St. Rep. 34.
 - (f) *State v. F. W. Woolworth* (1931) 184 Minn. 51, 237 N. W. 817, 76 A. L. R. 1202.
 - (g) *Hildreth v. Crawford* (1884) 65 Iowa, 339, 21 N. W. 667.
 - (h) *State v. Hamlett* (1908) 212 Mo. 80, 110 S. W. 1082.
2. That the Statutes are Unconstitutional and Invalid.
 - (a) *State v. Childs* (1927) 32 Ariz. 222, 257 P. 366, 54 A. L. R. 736.
 - (b) *Noel v. People* (1900) 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238.
 - (c) *State v. Geest* (1929) 118 Neb. 562, 225 N. W. 709.
 - (d) *State v. Wood* (1927) 51 S. D. 485, 215 N. W. 487, 54 A. L. R. 719.

Patent and Proprietary Medicines Sold by Dealers Other than Pharmacists

In a former paragraph the statement was made that several states do not limit the sale of patent and proprietary medicines to registered pharmacists. In these jurisdictions much controversy has arisen over certain articles and preparations sold by dealers who are not druggists. It is naturally the wish of a person selling patent and proprietary medicines to make his stock of remedies sufficiently complete to meet the demands of his customers. In his attempt so to do he has sometimes included in his stock items which the courts have decided do not properly come within this classification. Below are listed a few of the articles over which litigation has arisen and decisions as to their status.

(a) Milk of magnesia not a patent or proprietary medicine. *State of Minnesota v. F. W. Woolworth Co.* (1931) 184 Minn. 51, 237 N. W. 817, 76 A. L. R. 1202.

(b) Aspirin is a drug and not a patent medicine. *State v. Zotalis* (1927) 172 Minn. 132, 214 N. W. 766.

(c) Aspirin is a drug and not a proprietary medicine in Iowa. *State v. Jewett Market Co.* (1929) 209 Iowa, 567, 228 N. W. 288.

(d) Camphorated oil, corked and sealed, is not a patent or proprietary medicine. *Board of Pharmacy v. Abramoff* (1928) 141 A. 587, 6 N. J. Misc. 437.

(e) Henry's Calcinel Magnesia was held a proprietary medicine. *Ferguson v. Arthur* (1886) 117 U. S. 482, 6 S. Ct. 861, 29 L. Ed. 979.

(f) Beef, Iron, and Wine not a patent medicine. *State v. Donaldson* (1889) 41 Minn. 74, 42 N. W. 781.

(g) Arp's Pepsin Bitters were proprietary preparations. *Grommes v. Seeberger* (C. C. 1889) 41 F. 32.

Michigan Law Holds Druggist Responsible for Quality of Drugs—Patent or Proprietary Medicines Excepted

Statute: Every Proprietor of a wholesale, or retail drug store, pharmacy, or other place where drugs, medicines or chemicals are compounded, disposed or sold, shall be held responsible for the quality and strength of all drugs, chemicals or medicines sold or dispensed by him except those articles known as patent

or proprietary medicines. Pharmacy Act, § 17, (Comp. Laws 1929, § 6843).

Legal Rights When Engaged in the Unlawful Manufacture of Medical Compound

The plaintiff, who was neither a druggist nor a pharmacist, was engaged in the unlawful manufacture of medicine, and a druggist by mistake sold him hydrochloric acid instead of sulphuric acid, which when used by the plaintiff ruined his medicine and injured his business. No recovery was allowed, as his business was illegal. The court used strong language in this case: "It is dangerous enough that we must take regular drugs and medicines prescribed by skilled physicians and prepared by licensed druggists; but God save us if the ignorant but pretentious unlicensed compounders and vendors of cure-alls and nostrums are to be turned loose to prey upon our credulity." *Lewis v. Brannen* (1909) 6 Ga. App. 419, 65 S. E. 189.

North Carolina Prohibits Sale or Advertising Certain Patent Cures and Devices

Statute: It shall be unlawful for any person, firm, association, or corporation in this State, or any agent thereof, to sell or offer for sale any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device whose claims for the cure or treatment of disease are false or fraudulent; and that it shall be unlawful for any person, firm, association, or corporation in the State, or any agent thereof, to publish in any manner, or by any means, or cause to be published, circulated, or in any way be placed before the public any advertisement in a newspaper or other publication or in the form of books, pamphlets, handbills, circulars, either printed or written, or by any drawing, map, print, tag, or by any other means whatsoever, any advertisement of any kind or description offering for sale or commending to the public any proprietary or patent medicine or remedy purporting to cure cancer, consumption, diabetes, paralysis, Bright's disease, or any other disease for which no cure has been found, or any mechanical device for the treatment of disease, when the North Carolina Board of Health shall declare that such device is without value in the treatment of disease.

Any person, firm, association, or corporation violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction shall be fined not exceeding one hundred dollars for each offence. Each sale, offer for sale, or publication of any advertisement for sale of any of the medicines, remedies, or devices mentioned in this section shall constitute a separate offense. N. C. Code 1927, § 6684.

CHAPTER 9

CONTRIBUTORY NEGLIGENCE

Negligence as a Foundation of Civil Liability

It is the legal duty of every person to conduct himself and his affairs with care and forethought. Judge Cooley, in his text on torts, defines negligence as "The failure to observe, for the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances demand, whereby such other person suffers injury." What constitutes negligence is usually determined by the rules of the common law.

Contributory Negligence

In these busy days many accidents are happening with much loss of property and injury to persons. These accidents give rise to many suits, based upon the negligence of the party or parties concerned. If only one party is negligent, he is liable, but, if both parties are equally negligent, one should not be permitted to recover against the other. This contributory negligence on the part of the one suing is a defense to his recovery. By contributory negligence is meant the lack of care or caution on the part of the injured party which contributed directly to the injury. In such a situation the injury would be caused by the joint negligence of both parties and not by the sole negligence of the defendant. Contributory negligence is a defense, and the defendant must be able to establish the want of due care and caution on the part of the plaintiff and must be able to show its connection with the injury being sued upon.

Negligence of Customer—Legal Consequences

In *Cullinan v. Tetrault* (see readings) the plaintiff and a friend entered the defendant's drug store to purchase a harmless extract. There was an obviously incompetent boy in charge of the drug store. When asked for the extract, the boy handed a bottle to the customer and asked him to smell it and to see if it was what he wanted. The customer smelled of the bottle, passed it back, and said it was what he wanted. It turned out to be poison,

and caused the death of one person and serious injury to another. The conduct of the customer was held to be not only negligent but foolhardy. "To purchase anything in a drug store from a boy who did not know what he was selling, had no realization of the dangerous qualities of the article, and appealed to the purchaser to know if it was what he wanted, and to accept the article solely upon the evidence of the sense of smell, disregarding the label on the bottle, is the height of negligence." This negligence on the part of the customer barred a recovery.

Taking the Wrong Package as Contributory Negligence

Case:

KEATING v. HULL.

Supreme Court of Errors of Connecticut, 1905. 78 Conn. 719,
62 A. 661.

The plaintiff entered a drug store kept by the defendant and asked one of his clerks for a pound of Sprudel salts. It was weighed out, put up in a package, and placed on the counter in front of her so as to be under her control. While she was chatting with the clerk, another customer, who stood close by her, ordered of the defendant a pound of sulphate of zinc. This is a poisonous article. It was weighed out, put up in a package, and placed on the counter before the purchaser; the defendant then going off to get a "poison" label to put upon it and telling him at the same time to wait till he returned with this. Before he returned, the plaintiff picked up the latter package, negligently mistaking it for that which she had bought, and carried it home; the other customer shortly afterward taking the remaining package and going off with it without waiting for the label. Afterward the plaintiff used some of the sulphate of zinc (which looks very much like Sprudel salts) for medicinal purposes, and was poisoned by it.

Question: Was the plaintiff negligent, and, if so, did it defeat her recovery?

BALDWIN, J. The trial court found the defendant guilty of negligence in leaving the poison, unlabeled, where the plaintiff might take it by mistake for her own parcel, but that she was negligent in so taking it, and therefore awarded her only nominal damages. There is no error.

Review of Keating v. Hull:

1. What negligence was attributed to the defendant?
2. What was the negligence of the plaintiff?
3. How does the doctrine of contributory negligence apply to the facts as stated?
4. Why should a plaintiff not recover if his negligence contributed to the accident?
5. State the question involved.
6. State the rule of contributory negligence.

Failure to Discover the Mistake as Contributory Negligence*Case:***GORMAN-GAMMIL DRUG CO. v. WATKINS.**

Supreme Court of Alabama, 1914. 185 Ala. 653, 64 So. 350.

A dairyman sued a druggist in an action on the case for negligently delivering to the plaintiff five pounds of common salt in lieu of five pounds of Epsom salts, as ordered, which, as alleged, proximately caused the death of plaintiff's cow to which he administered a dose of it—two pounds—as the evidence shows. Defendant pleaded the general issue and a special plea of contributory negligence.

Question: Was there such contributory negligence as to defeat recovery by the plaintiff?

SOMERVILLE, J. Whether or not defendant was guilty of error or negligence in supplying plaintiff with an article radically different in fact from the article ordered, and whether or not that negligence, if found, proximately produced the untimely demise of plaintiff's cow, were disputed questions of fact to be determined by the jury. But that plaintiff was himself guilty of the grossest negligence, which was immediately productive of the animal's death, is a clear conclusion of law from which there is no escape.

There is no confusing similarity in the appearance of common salt and Epsom salts. Both are household articles in common use, and more or less familiar to all men of ordinary intelligence and experience. Moreover, plaintiff was a dairyman of long experience, and quite familiar with the use of both articles in the course of his business. He was skilled in the art of bovine healing by a practice of 30 years upon his own animals, and he

habitually administered to them Epsom salts for the relief of those digestive disorders to which they were frequently subject.

He saw and intimately handled this salt, which was not labeled Epsom salts, and which was in a bag showing on its face that it came from defendant's "seed and dairy" store, a separate and distinct branch of its business, from which plaintiff customarily bought his butter salt for use in his dairy. It was not at all like Epsom salts, and on his cross-examination plaintiff demonstrated his ability to readily distinguish it from that article.

The ordinary conduct of rational beings must be governed by common prudence and common sense, and he who fails in this to his own hurt cannot justly charge the ill's that follow to the antecedent and remote fault of another, albeit such remote fault supplies the condition without which the injury would not have occurred.

The result here complained of was plainly due to the inexcusable carelessness and folly of plaintiff, and to allow him to recover damages from defendant under the circumstances shown would certainly insult the common sense of mankind. The verdict of the jury was contrary to the law and the evidence, and should have been set aside by the trial court on the motion of defendant.

Review of Gorman-Gammil Drug Co. v. Watkins:

1. What negligence was attributed to each party?
2. Which party pleaded the special plea of contributory negligence?
3. Why was the plaintiff guilty of the grossest negligence?

Purchasers did Not Discover that Linseed Oil was Delivered Instead of Cod Liver Oil

Case:

ELLIS v. LINDMARK.

Supreme Court of Minnesota, 1929. 177 Minn. 390, 225 N. W. 395.

An action by Levi E. Ellis to recover damages for negligence against J. W. Lindmark and the Minneapolis Drug Company. There was a verdict for the plaintiff, and the defendants appeal.

The defendant Lindmark is a retail druggist in Moose Lake, Carlton county. The defendant Minneapolis Drug Company is a wholesale druggist in Minneapolis. On February 5, 1927, Lindmark ordered through the traveling salesman of the drug company a barrel of cod liver oil. He told him that he wanted a good grade of cod liver oil for poultry. The plaintiffs and oth-

er poultry raisers had requested him to order in bulk. Before that he had ordered in bottles and containers. A barrel of raw linseed oil was sent him. It was invoiced as cod liver oil. On the freight bill it was designated as cod liver oil. It was taken by the drayman employed by Lindmark and unloaded in the basement of his store, bung end up. The other end was labeled linseed oil. He siphoned oil from it for the plaintiffs, and they used it in a mash for their poultry. They questioned whether it was cod liver oil, asked him about it, and were assured it was.

- Questions:*
1. Whether the drug company was negligent.
 2. Whether Lindmark was negligent.
 3. Whether the plaintiffs were guilty of contributory negligence preventing recovery.

DIBELL, J. 1. We have no difficulty in sustaining the finding of the jury that the drug company was negligent in sending raw linseed oil instead of the cod liver oil ordered. Some one connected with it and for whose act it was responsible was careless and blundered. The mere statement of the facts is sufficient to justify a finding of negligence.

2. The evidence sustains a finding that Lindmark was negligent. He was a pharmacist of many years' experience. He siphoned the oil from the barrel. He had the opportunity of knowing from the sense of taste and smell and sight the character of the substance. He had dealt in cod liver oil and linseed oil before. When his attention was called to the character of the oil by the plaintiffs, he assured them that it was good cod liver oil. There is no reason for questioning the jury's finding of the negligence of Lindmark. * * *

3. The plaintiffs cannot be charged as a matter of law with contributory negligence in using the linseed oil. There was no negligence in their taking it from the store. They took it in a container which had been used before for cod liver oil. They became suspicious. They went to Lindmark and queried him about it, and were assured that the oil was genuine cod liver oil of excellent quality. He was supposedly skilled as a pharmacist. They were not much experienced. They had dealt with him before. Naturally enough they would rely upon him. It was for the jury to say whether they were contributorily negligent. *Fisher v. Golladay*, 38 Mo. App. 531; *Wright v. Howe*, 46 Utah, 588, 150 P. 956, L. R. A. 1916B, 1104; *Moran v. Dake Drug Co.* (Sup.) 134 N. Y. S. 995, affirmed in 155 App. Div. 879, 139

N. Y. S. 1134. That they did not desist from its use upon first suspicion does not as a matter of law show them to be negligent.

Review of Ellis v. Lindmark:

1. Why were there two defendants?
2. What mistake was attributed to Lindmark?
3. State three questions involved.
4. What was the negligence of the drug company?
5. Why was there no contributory negligence?

Using Carbolic Acid to Wash a Wound

Case:

HORST v. WALTER.

Supreme Court of New York, Appellate Term, 1907. 53 Misc. 591,
103 N. Y. S. 750.

The action was brought to recover for injuries received by the plaintiff through the alleged negligence of the defendant's servant. The plaintiff's wife went to the defendant's drug store and asked for something to wash out a wound or cut which her husband had received on his knee. The clerk gave her a small bottle bearing the words, among others: "Poison. Carbolic Acid." She took this home and applied it to the wound. The result was that the knee was burned, and turned black, and caused serious trouble. Upon chemical analysis, the solution was found to contain between 86 and 90 per cent. of carbolic acid.

- Questions:*
1. Was the act of selling the preparation, under the circumstances shown, one that would have constituted legal negligence if done by the defendant himself, instead of his clerk?
 2. Was the plaintiff guilty of contributory negligence?

GIEGERICH, J. On the first point it has been held in this state that a druggist is liable in negligence for damage caused by the sale of poisonous medicine without proper label or instructions. *Wohlfahrt v. Beckert*, 27 Hun, 74, affirmed, 92 N. Y. 490, 44 Am. Rep. 406. In the present case there can be little question that it was a negligent act for the druggist to sell a solution of carbolic acid of such strength. Section 67 of the Sanitary Code prescribes that:

"No phenol, commonly known as carbolic acid, shall be sold at retail by any person in the city of New York, except upon the prescription of a physician, when in a stronger solution than 5 per cent."

It was conceded on the trial, by the defendant's attorney, that no druggist has a right to furnish such acid of a stronger solution than 5 per cent., unless accompanied by the prescription of a doctor. But, aside from such prohibition of the Sanitary Code, we do not think there can be any doubt that it is an act of negligence for a druggist, when asked for a solution to wash a wound, to sell a preparation of such a dangerous character as was furnished in this case. * * *

It is suggested by the appellant that the plaintiff was guilty of contributory negligence, but we see no ground for any such contention. The plaintiff had a right to suppose that the defendant and his employes would perform their duty with care, and, when applied to for some solution to wash a wound, that they would furnish something, if not efficient, at least harmless, and was warranted in applying it without further inquiry.

The judgment should be affirmed, with costs. All concur.

Review of Horst v. Walter :

1. Why was the action brought?
2. What was the negligence set out in the pleadings?
3. State the questions involved.
4. What was the provision of the New York Sanitary Code?
5. If there had not been this provision of the Code, would the defendant have been liable anyway?
6. Did it make any difference that the customer requested a drug for a specific purpose?
7. When is a druggist liable for the acts of his clerk?
8. Why was there no contributory negligence on the part of the customer?
9. How does contributory negligence affect a case?
10. Formulate the rule or rules of the case.

Injured Party did Not Read the Label

Case:

HENDRY v. JUDGE & DOLPH DRUG CO.

Court of Appeals of Missouri, 1923. 211 Mo. App. 166, 245 S. W. 358.

This is an action to recover for injuries received by the plaintiff through the alleged negligence of defendant's servant. Plaintiff went to the store of defendant, who is a druggist, and called for Rochelle salts. She was waited upon by a clerk of defendant, who delivered to her a can of "Roachsault." Supposing that the can delivered to her contained the salts called for, plaintiff upon her return home took two tablespoonfuls of the contents thereof in a glassful of water, with the intention of taking same as a mild purgative, and very soon thereafter, and as a result of taking said substance, felt violent pains in the region of her abdomen, became afflicted with vomiting, and suffered from an acute gastritis; thereafter plaintiff examined the can and found she had taken "Roachsault." The evidence further disclosed that the can was wrapped in a piece of plain wrapping paper of the defendant, and that on neither the wrapper nor the can did the word "Poison" appear to advise the plaintiff of the poisonous and dangerous character of said drug. Before taking of the contents, the plaintiff did not read or examine the label thereon.

Question: Was the plaintiff guilty of contributory negligence in not reading the label before taking the medicine?

BRUERE, C. The defendant, in selling the drug in question, impliedly warranted that it was the article called for and purchased by the plaintiff. The evidence is conclusive that plaintiff was not aware of the poisonous character of the article delivered to her, when she partook of it, but relied on the defendant's warranty to furnish the article called for. The substitution of the poisonous for the harmless article rendered the defendant liable to the plaintiff for injury proximately resulting from its negligence or breach of duty. Moreover, the statute law of Missouri (section 3625, R. S. 1919) imposes on the defendant the duty not to sell any substance, usually denominated a poison, without having the word "Poison" plainly written or printed on

a label attached to vial, box, vessel, or package containing same, and a violation of that duty is denounced as a crime punishable by fine.

It is conceded that the defendant failed to place a label on the box in question containing the word "Poison." If the contents of the box was a substance usually denominated a poison, then the failure to label the box, as required by the statute, constituted negligence per se, and rendered the defendant liable to plaintiff for injuries resulting from such breach. This statute was designed to protect the public against injury of the character suffered by the plaintiff. It prescribes a legal way in which the seller shall advise the purchaser of the poisonous character of the substance sold, to wit, to plainly mark said substance "Poison"; any other marking will not protect the seller.

The plaintiff herself removed the wrapper from said can and opened same. She therefore must have looked at the can, but did not inspect it sufficiently to discover anything suspicious to invite further investigation. If the can had been plainly labeled "Poison," as required by the statute, a mere glance at the can would have apprised plaintiff of the dangerous character of the substance she was about to take, and doubtless this accident would not have happened.

Review of Hendry v. Judge & Dolph Drug Co.:

1. What was the purpose of the suit?
2. State the facts briefly.
3. Why did the acts of the plaintiff not constitute contributory negligence?
4. What did the druggist warrant by making the sale?
5. Why was it not negligence for the plaintiff not to read the label?

Evidence of Subsequent Care and Treatment

When a harmful drug is negligently sold in place of a harmless one, for what purpose may evidence of improper treatment or want of due care after the injury, be introduced? This question was answered by Justice Cooley as follows: "If the drug was negligently sold, as is charged in this case, and was subsequently taken by the plaintiff without fault on her part or on the part of any one whose act in administering it is to be imputed to her, these facts constitute that necessary concurrence of wrong and damage which will support an action. It is not

necessary to inquire into the subsequent treatment of the case in order to determine the question of legal wrong. A heedless attendant cannot release the defendant from his responsibility by neglecting his own duty, nor can the physician do so by treating the case improperly. But the question of the extent of the injury which is traceable to the defendant's negligence is another matter altogether. To judge of that it is necessary to inquire into the care and treatment which the plaintiff subsequently received. If it shall appear that the injury to the plaintiff's health is traceable not to the drug itself, but to improper treatment or want of due care after it was taken, it will then be obvious that the plaintiff's injury at the hand of the defendant is merely nominal. The question will then become one of damages only, and must be disposed of by the jury." *Brown v. Marshall*, 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

Digest of Cases on Contributory Negligence:

1. The Customer was Grossly Intoxicated. In an action against a druggist for death of the plaintiff's minor son, a declaration which alleges that the latter died from the effects of chloroform sold him by such druggist while he was in a grossly intoxicated condition shows facts sufficient to support a defense of contributory negligence. *Meyer v. King* (1894) 72 Miss. 1, 16 So. 245, 35 L. R. A. 474.

2. Failure to Read Label. Chalcy White, 6 years old, died from a dose of morphine, which had been sold by the druggist to her uncle when quinine was ordered. Held, although it may have been negligence on the part of the uncle not to read the label, yet it was not such contributory negligence as to defeat the cause of action by the parents to recover damages for the death of the child. *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85.

3. Contributory Negligence is a Jury Question. In an action for injuries from poisoning by drugs sold to the plaintiff by mistake, it is for the jury to determine whether he acted with reasonable prudence and without contributory negligence, although he did not read the writing upon the package delivered to him. *Moran v. Dake Drug Co.* (Sup. 1912) 134 N. Y. S. 995, affirmed (1913) 155 App. Div. 879, 139 N. Y. S. 1134.

4. Proprietary Drug Contains Statement of Ingredients. One not a physician, who purchased and used an eye wash recommended by the maker for use as a home remedy and bearing a statement on the container that it was harmless, cannot be held, as a matter of law, to have assumed the risk because a

statement of the ingredients was also given. *Valmas Drug Co. v. Smoots* (C. C. A. 1920) 269 F. 356.

Readings: Contributory Negligence of Customer may Defeat Recovery.

1. Customer Helped Himself to Poisonous Drug. *Gwynn v. Duffield* (1883) 61 Iowa, 64, 15 N. W. 594, 47 Am. Rep. 802, also *Id.*, 66 Iowa, 708, 24 N. W. 523, 55 Am. Rep. 286.
2. Druggist Explained the Use of the Drug. *Wohlfahrt v. Beckert* (1883) 92 N. Y. 490, 12 Abb. N. C. 478, 44 Am. Rep. 406.
3. Statute Concerning Sale of Poisons. *Hackett v. Pratt and Kuechler* (1893) 52 Ill. App. 346.
4. Duty of Both Parties on Sale of Poisons. *Sutton's Administrator v. Wood* (1905) 120 Ky. 23, 85 S. W. 201, 8 Ann. Cas. 894.
5. Label When Physician's Prescription Contains Poison. *Wise v. Morgan* (1898) 101 Tenn. 273, 48 S. W. 971, 44 L. R. A. 548.
6. Customer Negligent in Relying on His Sense of Smell to Secure Desired Drug. *Cullinan v. Tetrault* (1923) 123 Me. 302, 122 A. 770, 31 A. L. R. 1330.

CHAPTER 10

LIABILITY OF DRUGGIST FOR THE MISTAKES OF HIS CLERK

Druggist Liable for Mistakes of His Clerk

The leading maxim of master and servant is "*Qui facit per alium facit per se*," meaning that "he who acts through another, acts for himself." In the application of this rule, it is held that the agent is merely a medium through which the principal acts. If, then, a druggist holds himself out as prepared and qualified to fill prescriptions, he thereby makes himself liable, if a clerk in the discharge of his duties to his employer, is negligent, and if injury results from such negligence. It is no defense that the clerk was told not to sell certain things, or that the clerk was experienced, competent, and even properly registered. In one case it was decided that it was no defense that there was an epidemic, and, owing to the exhaustion of the clerk, the mistake was made.

If a statute provides that it shall be unlawful for any person to sell any drug, medicine, or chemical, or to compound any prescription of a medical practitioner, unless such person is a registered pharmacist or a registered assistant pharmacist, a sale by an unqualified person, from which injury results, constitutes negligence *per se*, which means that it amounts to conclusive evidence of negligence.

Negligence of Drug Clerk in the Course of His Employment

It is a settled rule of law that an employer is liable for injuries caused by the negligence of his employee while the latter is engaged in the performance of his usual and customary duties. This rule can apply only when the cause of the injury which was the result of the negligence occurred while the employee was actually about his usual and customary work. It is often difficult to determine whether a specified act falls within the duties of the employee.

In accordance with this rule, a druggist was held liable in damages for an injury caused by his servant. The clerk was hired to sell paints, oils, notions, and all goods other than drugs, med-

icines, or poisons. However he was permitted to sell drugs under the supervision of the druggist and, by mistake, sold a deadly poison in the place of a harmless medicine. The druggist was liable. *Smith v. Hays* (1886) 23 Ill. App. 244.

Clerk though a Registered Pharmacist Makes a Mistake

Case:

TOMBARI v. CONNORS.

Supreme Court of Errors of Connecticut, 1912. 85 Conn. 231,
82 A. 640, 39 L. R. A. (N. S.) 274.

This action is against a druggist for the negligence of a clerk employed by him in putting up a prescription.

The finding shows that in July, 1910, the defendant, who is a pharmacist, owned and conducted a drug store in New Britain, Conn., and that one Benjamin Cutner, who is also a licensed pharmacist, was in his employ as a clerk. The plaintiff is living with her husband and children in New Britain. She is an Italian, and does not speak or understand the English language. On July 23, 1910, she was suffering from an attack of indigestion, and, with a friend, who acted as an interpreter, went to a doctor's office in New Britain. The doctor diagnosed the plaintiff's complaint as indigestion, and gave her a prescription, with directions to have it filled at some pharmacy. Mrs. Tombari, with her friend, went to the drug store of the defendant, and gave the prescription to Cutner, the clerk, to be filled. The ingredients written in the prescription, as the doctor intended them to be read, are as follows: "Rhei, Calumba, Bismuth Sub, Sodii Bicarb, Zingiber, Fiat in Chart XXIV, One t. i. d." The interpretation as the doctor intended it to be read is as follows: "Rhubarb one drachm, calumba, subnitrate of bismuth, bicarbonate of sodium, and ginger, each two drachms. To be made into 24 powders. One three times a day." The clerk read the prescription as intended, except that he interpreted the second word to mean "calomel," instead of "calumba"; and he accordingly put up the powders, each containing five grains of calomel. Calumba is a mild bitter tonic, useful in functional disturbances of the digestive organs, and is not used frequently. Calomel is chloride of mercury, and is in frequent use in small doses as a purgative and stimulant of the liver. A prescription for five grains of calomel to be taken three times a day, making a total of 120 grains, or 2 drachms in eight days, would be unusual, though not unprecedented in some violent diseases. The quantity of calomel

compounded by the clerk attracted his attention, and he inquired of the plaintiff through her interpreter if she understood the dose, and had any special instructions from the doctor. The record does not disclose that any response was given to this inquiry. The taking of six of these powders by the plaintiff as prepared produced a very violent diarrhea and vomiting by which she was rendered excessively weak, and also produced an excessive flow of saliva, which continually filled and flowed from her mouth, produced the unpleasant odor of mercury; and also produced great pain in her gums, and caused the temporary loosening of her teeth. Her lips and throat became swollen and painful. She sent for the doctor, who immediately discovered the mistake that had been made, and gave her remedies to relieve her of the effects of calomel.

Question: Is the druggist liable for injury resulting by negligence of his clerk in compounding a prescription though the clerk is a registered pharmacist?

RORABACK, J. It is elementary that the master who undertakes to perform a service is liable for the negligence of his servant, who, when in the scope of his employment, is performing the services undertaken.

The fact that Cutner, the defendant's clerk who compounded the prescription in question, "was a competent druggist of experience," does not relieve the defendant from a claim for damages for injuries sustained on account of negligence of his clerk. "The most skillful and competent may be, and human experience teaches us will be, sometimes negligent. Hence the fact that one is skillful and competent may prove that he will generally be more careful than the unskillful and incompetent; but it has no tendency to prove due care on a particular occasion."

* * *

The trial court has found that the defendant's clerk was negligent in compounding the powders in question as he did, and then delivering them to the plaintiff. This conclusion is a question of fact, and must stand, unless it is inconsistent with the other subordinate facts which have been set forth in the finding. * * *

It is found that calumba was intended, and that calomel was given. Calomel was furnished by mistake. A prescription calling for 120 grains of calomel to be taken in 24 powders, one three times a day, is extraordinary, and, if taken as directed, was liable to be attended with serious results. Cutner was an experi-

enced pharmacist, and, when he delivered the medicine as he had compounded it, he could have anticipated that an injury like that which actually occurred would naturally follow. He could have seen from the nationality and appearance of the plaintiff that she knew nothing of the property and uses of calomel. The prescription itself as he read it in connection with the surrounding circumstances excited his suspicion that calomel was not intended. The record does not disclose that he then made a reasonable effort to ascertain whether he might not be mistaken.

The defendant contends that the prescription was written in Latin, illegible, and doubtful as to what drug was really intended. Assuming this to be true, it did not lessen the duty of the clerk to be alert to avoid a mistake. If there was any reasonable doubt as to the identical thing ordered, the defendant's clerk should have taken all reasonable precaution to be certain that he did not sell one thing when another had been called for. The trial court has found that such precaution was not taken. There is nothing in any of the subordinate facts appearing in the record inconsistent with this conclusion.

Review of Tombari v. Connors:

1. Against whom was the action brought?
2. What mistake was made?
3. As the clerk made inquiry concerning the prescription, why was he held negligent?
4. What is the question involved?
5. When is a master liable for the negligence of his employee?
6. If a druggist is skillful and competent, why is he not relieved from liability for his negligence?
7. What had the trial court found?
8. Why was this a question of fact?
9. Why should Cutner have anticipated an injury?
10. How did the question of nationality enter into the case?
11. Did the fact that the prescription was written in Latin lessen the duty of the clerk?
12. What is the duty of a druggist if a prescription is illegible?
13. Formulate the rule of the case on the question of the liability of the druggist as an employer.

Clerk Violates Instructions Not to Sell Drugs

Case:

NESCI v. ANGELO.

Supreme Judicial Court of Massachusetts, 1924. 249 Mass. 508,
144 N. E. 287.

This is an action brought against the proprietor of a drug store by the administrator of Elizabeth Nesci for negligence resulting in her conscious suffering and death.

There was evidence to show that Elizabeth Nesci died from the administration of strychnine contained in a medicine obtained at the drug store of the defendant and compounded by one Di Napoli, then in his employ. The prescription called for styp-tocin as one of the ingredients, and the presence of strychnine was due to a substitution of strychnine for styptocin in compounding the medicine. Strychnine is a deadly poison, and is never given in doses exceeding one-twentieth of a grain. Styp-tocin does not contain strychnine, and the prescription called for a dose of two grains.

The defendant contended that Di Napoli had no authority to put up the prescription and was not acting within the scope of his employment in compounding it. There was evidence that, when employed, Di Napoli was instructed that he was employed merely to sell cigars, candy, toilet articles, patent medicines, and such articles, but under no circumstances was he to put up prescriptions. He was not registered in Massachusetts under G. L. c. 112, § 24, as a pharmacist, and no inquiry was made in regard to his registration elsewhere. The defendant, himself registered, lived above the store and could be called at any time to fill prescriptions, and a registered pharmacist also was employed to be in the store when the defendant was away.

On the afternoon in question the defendant left the store about 1 o'clock and did not return till about 6 o'clock. He left Di Napoli alone in the store. There were signs: "Prescriptions Filled." No one but Di Napoli was in the store when the prescription was left with him to be filled, and no one but Di Napoli was there when the medicine was delivered by him. The defendant testified that he left a telephone number by which he could be summoned if any prescriptions were presented, in his absence, to be filled. Dr. Shain, who wrote the prescription, testified that he knew Di Napoli, and frequently had seen him filling prescriptions in the store.

Question: Even though the employee has no authority to fill prescriptions, yet if he does so in the course of his business, and injury results from his negligence, is his employer liable?

WAIT, J. It is clear from the foregoing statement of the evidence that the jurors could believe that Di Napoli had many times filled prescriptions; that they could disbelieve that he had been instructed never under any circumstances to fill them; and that they could find that he possessed, in fact, from his employer, all the authority which leaving him as the only employee in a store which openly advertised to fill prescriptions would imply. Furthermore they could find he had been negligent in substituting strychnine for styptocin.

Review of Nesci v. Angelo:

1. Against whom was the action brought?
2. Why was the action by the administrator?
3. What mistake was made?
4. What was the contention of the defendant?
5. Why did not the precaution taken by the druggist relieve him from liability?
6. What was the purpose of the testimony of the doctor?
7. What was the question involved?
8. What did the jury find?
9. What is the principal value of the case?

Secret Instructions to Clerk No Defense

A druggist employed a boy about 18 years old as a clerk in his store. A customer asked for 10 cents' worth of cream of tartar. The boy by mistake delivered to him tartar emetic, wrapping it up in an ordinary paper package without a label. A fatal injury resulted. Evidence showed that the clerk was forbidden to sell drugs, so the druggist contended that the act being outside the scope of authority of the clerk, the employer should not be held liable. Notwithstanding this, the court held the druggist liable, saying: "The evidence shows that at the time the purchase was made Christopherson (clerk) was in sole charge of the store. There is no proof that Mr. Sterner (customer) knew, or had any reason to surmise, that there was any limitation on his authority. If one enters a store and finds a person apparently in charge, in the absence of notice to the contrary, he has a right to presume

that such person is authorized to sell any ordinary article of merchandise kept for the purpose of sale and to rely upon him procuring and furnishing the article asked for. * * * Even though the clerk disobeyed his instructions, it is a settled principle that a master is liable for the consequences of the negligent conduct of his servant, committed in the course of his employment, although the particular act complained of was unauthorized by the master, and was done in disobedience of his commands." *Moses v. Mathews* (1914) 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698.

Drug Clerk has No Authority to Apply Medicine

In *Peters v. Enderle Drug Co.* (Mo. App. 1927) 294 S. W. 740, the plaintiff charged that he was suffering from a toothache and that a clerk in the drug store of the defendant made up a prescription of silver nitrate and applied some of the solution to his tooth and mouth, inflicting terrible burns and wounds, and it was held that a drug clerk is not presumed to have authority to administer medicine to the mouth of a customer who inquires for a toothache remedy. The court said: "Of course, the drug company was not organized to practice dentistry, nor could it be so organized. Nor does the presumption arise of such authority in the clerk to administer treatment merely because he did so. And it would seem that the act of the clerk in practicing dentistry was outside the scope of his employment. It certainly was outside the charter rights of the drug company."

Review of Peters v. Enderle Drug Co.:

1. What charges were made by the plaintiff?
2. What acts were alleged to have been performed by the drug clerk?
3. Was the drug clerk in applying the silver nitrate acting within the scope of his authority?
4. Would the employer be liable for the act of negligence of the clerk, if the clerk was not acting within the scope of his authority?
5. What difference did it make that the drug company was not organized to practice dentistry?
6. Why would no presumption of authority in the clerk arise from the fact that he did administer the drug?

Liability of Druggist for Mistakes of His Clerk

Digest of Cases:

1. Druggist held liable for reasonable expense of nursing and medical treatment, and for value of parent's services while nursing it, where sickness of child was caused by druggist's clerk negligently placing calomel in prescription not calling for it. *McGahey v. Albritton* (1926) 214 Ala. 279, 107 So. 751.

2. Clerk by Mistake Sold Croton Oil Instead of Linseed Oil. A customer who suffered an injury by taking a poison put up for him by the druggist's clerk by mistake has an action against the druggist. *Hansford's Adm'x v. Payne*, 11 Bush (74 Ky.) 380.

3. A drug clerk by mistake delivered tartar emetic instead of cream of tartar requested by the customer, and injury resulted. Held, that the master is liable for the consequences of the negligent conduct of his servant, committed in the apparent scope of his employment, although the particular act complained of was unauthorized by the master, and was done in disobedience to his command. *Moses v. Mathews* (1914) 95 Neb. 672, 146 N. W. 920, Ann. Cas. 1915A, 698.

Readings: Liability of Employer for Mistakes of Clerks and Employees.

1. Liability of Registered Pharmacist When Placed in Full Charge. *Haas v. People of State of Illinois* (1888) 27 Ill. App. 416.

2. Liability of Druggist for Injury in Consequence of Mistake of Clerk.

(a) *Smith v. Hays* (1886) 23 Ill. App. 244.

(b) *Burgess v. Sims Drug Co.* (1901) 114 Iowa, 275, 86 N. W. 307, 54 L. R. A. 364, 89 Am. St. Rep. 359.

(c) *Fleet v. Hollenkemp* (1852) 13 B. Mon. (Ky.) 219, 56 Am. Dec. 563.

(d) *Brown v. Marshall* (1882) 47 Mich. 576, 11 N. W. 392, 41 Am. Rep. 728.

(e) *Goodwin v. Rowe* (1913) 67 Or. 1, 135 P. 171, Ann. Cas. 1915C, 416.

(f) *Kelly v. Ross* (1912) 165 Mo. App. 475, 148 S. W. 1000.

(g) *Horst v. Walter* (1907) 53 Misc. 591, 103 N. Y. S. 750.

- (h) *Smith v. Middleton* (1902) 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. Rep. 308.
- (i) *Howes v. Rose* (1895) 13 Ind. App. 674, 42 N. E. 303, 55 Am. St. Rep. 251.

CHAPTER 11

MANUFACTURERS AND WHOLESALERS OF
DRUGS**The Great Drug Case—Thomas v. Winchester (1852)**
6 N. Y. 397, 57 Am. Dec. 455

Legal liability between persons arises from one of two sources, breach of contract or the commission of a tort. Suit for breach of contract may be brought if some contract between the parties has been violated, while a tort action can be instituted for an injury that arises out of some condition that has no basis in contract express or implied. This brings up a question, Might any situation arise which would make it possible for a person to be liable in damages to some one with whom he has never had any dealings and of whom he has never heard? In the case of *Thomas v. Winchester* these inquiries are answered in the affirmative as to the liability of a manufacturer of drugs. A wholesale manufacturer sold to a retailer extract of belladonna, a deadly poison, labeled extract of dandelion, a simple and harmless remedy. The article was sold by the retailer and caused serious injury, owing to the error of the wholesaler. The manufacturing druggist was held legally responsible to the ultimate consumer, since he sold a poisonous drug labeled as harmless to a retailer, who in turn sold the product to a customer, who, without fault on his part and relying on the label, used it as a medicine. This decision was on the ground that it was a breach of duty. "The defendant's duty arose out of the nature of his business and the danger to others incident to its mismanagement. Nothing but mischief like that which actually happened could have been expected from sending the poison falsely labeled into the market; and the defendant is justly responsible for the probable consequences of the act. The duty of exercising caution in this respect did not arise out of the defendant's contract of sale to Aspinwall (retailer). The wrong done by the defendant was in putting the poison, mislabeled, into the hands of Aspinwall as an article of merchandise to be sold and afterwards used as the extract of dandelion, by some person then unknown."

Rule of Thomas v. Winchester

The manufacturer or druggist who puts on the market for sale a poison which he has carelessly labeled as a harmless medicine is legally liable to all persons who, through no fault of their own and in consequence of the false label, are injured. The rule of liability does not arise out of any contract or privity between the parties, but out of the duty which the law imposes on one to avoid acts in their nature dangerous to the lives of others. The fact that the poison was not sold directly to the injured person has no bearing on the case. The rule of liability is not defeated because the poison passed through a number of hands before reaching the person injured.

The rule of *Thomas v. Winchester* has been cited, approved, discussed, or quoted in several hundred cases both in America and in England, and has been applied to questions of law in many cases not involving drugs or poisons. In *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F, 696, Ann. Cas. 1916C, 440, an automobile manufacturer was held liable to a remote purchaser for injuries caused by a defective wheel, the defects of which could have been discovered by proper inspection. This application of the rule was made even though the defendant had purchased the wheel from another manufacturer. In this opinion the judge classed *Thomas v. Winchester* as a landmark in that it laid the foundation for the law on articles inherently or imminently dangerous.

Manufacturer Liable to Ultimate Consumer

As has been reiterated again and again, the person who compounds drugs is in a position of great responsibility toward those who use his products. This refers not only to the retailer, but, in even a greater degree, to the wholesale or manufacturing druggist. The latter is liable to a purchaser from a retail druggist for the injurious consequences of a mistake in the preparation even though the article may have passed through a number of intermediate hands. The nature of the business makes it a reasonable rule that the ultimate consumer may bring action against the manufacturer, bottler, or packer of products sold by a retailer in the original or sealed packages or bottles for injuries arising from the use of such products.

Liability of Manufacturer to Ultimate Consumer on Theory of Tort

In cases decided on the theory of tort, the general rule is that a manufacturer is not legally responsible for negligence in the construction, manufacture, or sale of articles to persons with whom he has no contractual relations. To this rule there is an exception in such articles as are "inherently or imminently dangerous." This principle stated by Justice Fuller in a Washington case has been much quoted: "One who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to anyone who is, without fault on his part, injured thereby. The rule does not rest upon any principle of contract, or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation between them. It rests on the principle that the original act of delivering the article is wrongful, and that everyone is responsible for the natural consequences of his wrongful acts." *Weiser v. Holzman* (1903) 33 Wash. 87, 73 P. 797, 99 Am. St. Rep. 932.

Manufacturer Liable to Ultimate Consumer on Theory of Implied Warranty

Ordinarily a manufacturer is liable only to his immediate vendor for breach of an implied warranty of merchandise manufactured by him, since his liability depends upon privity of contract. An exception exists if the manufacturer practices fraud or deceit, or if the injury is caused by something noxious or dangerous. A person purchasing patent or proprietary medicines has the right to rely upon the implied obligation of the manufacturer that he will not use ingredients that will prove harmful if the medicine is taken in the prescribed doses.

There are thus two reasons for the rule that the manufacturer is responsible to the ultimate consumer. In most of the cases which have come before the courts the manufacturer has been held liable on the theory of tort, but, in a few cases, liability has been adjudged on the theory of implied warranty.

Readings: Manufacturer Liable to Ultimate Consumer on Theory of Implied Warranty.

1. Manufacturer Liable on Implied Warranty. Dothan Chero-Cola Bottling Co. v. Weeks (1918) 16 Ala. App. 639, 80 So. 734.
2. Injurious Substance in Beverage. Jackson Coca Cola Bottling Co. v. Chapman (1914) 106 Miss. 864, 64 So. 791.
3. Manufacturer Liable on Theory of Privity of Contract. Mazetti v. Armour & Co. (1913) 75 Wash. 622, 135 P. 633, 48 L. R. A. (N. S.) 213, Ann. Cas. 1915C, 140.

Manufacturer Sued by Ultimate Consumer for Injury Caused by Use of Patent Medicine

Case:

BLOOD BALM CO. v. COOPER.

Supreme Court of Georgia, 1889. 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324.

Action by Cooper against the Blood Balm Company to recover for injuries suffered by him from taking a patent medicine manufactured by the defendants, called "B. B. B." The plaintiff purchased of a druggist three bottles of the medicine in question. The first two, while they did not relieve plaintiff, failed to produce any visible injurious effect. He then commenced taking a third bottle. The first dose made him sick, but he continued to follow strictly the directions accompanying the bottle, and, by the time half its contents were consumed, his head, neck, and breast were covered with red spots, and the inside of his mouth and throat were sore. He then commenced taking lime juice, in accordance with the directions; but his mouth continued to grow worse, and a large part of his hair fell from his head. It appeared from the evidence that the medicine was injurious and hurtful, because it contained an excessive amount of iodide of potash, and that, in pursuing the directions, plaintiff had taken daily more than sixty grains of that drug.

BLANDFORD, J. The main question in this case arises upon the refusal of the court below to award a nonsuit, and the solution of this question depends upon whether, where one prepares what is known as a proprietary or patent medicine, and puts it upon the market, and recommends it to the world as useful for the cure of certain diseases, the bottle containing it hav-

ing therewith a prescription made by the proprietor of the medicine, in which he states that it is to be taken in certain quantities, and such medicine, accompanied with this prescription, is sold by the proprietor to a druggist for the purpose of being resold to persons who might wish to use it, and the druggist sells the same to a person, who uses it in the quantity thus prescribed, and it being shown that the same contains a certain article known as the iodide of potash in such quantity as proves harmful to the person thus using, is the proprietor liable? The plaintiff in error insists that there is no liability on the part of the proprietor, (1) because it was not sold by the proprietor to the person injured, but by a druggist, who had purchased the same from the proprietor, (and several cases are cited to sustain this position;) (2) because the drug thus sold was not imminently hurtful or poisonous. * * *

We can see no difference whether the medicine was directly sold to the defendant in error by the proprietor or by an intermediate party to whom the proprietor had sold it in the first instance for the purpose of being sold again. It was put upon the market by the proprietor, not alone for the use of druggists to whom they might sell it, but to be used by the public in general, who might need the same for the cure of certain diseases, for which the proprietor set forth in his label the same was adapted. This was the same thing as if the proprietor himself had sold this medicine to the defendant in error, with his instructions and directions as to how the same should be taken. In all the cases cited by the plaintiff in error there is no case in which the proprietor prescribed the doses and quantities to be taken of the medicine sold by him. If this medicine contained the iodide of potassium in sufficient quantity to produce the injurious consequences complained of to the defendant in error, and if the same was administered to him either by himself or any other person, as prescribed in the label accompanying the medicine, he could, in our judgment, recover for any injury he may have sustained on account of the poisonous effect thereof. It was a wrong on the part of the proprietor to extend to the public generally an invitation to take the medicine in quantities sufficient to injure and damage persons who might take it. A medicine which is known to the public as being dangerous and poisonous if taken in large quantities may be sold by the proprietor to druggists and others, and if any person, without more, should purchase and take the same so as to cause injury to himself, the proprietor would not be liable. But if the con-

tents of a medicine are concealed from the public generally, and the medicine is prepared by one who knows its contents, and he sells the same, recommending it for certain diseases, and prescribing the mode in which it shall be taken, and injury is thereby sustained by the person taking the same, the proprietor would be liable for the damage thus sustained. These proprietary or patent medicines are secret, or intended by the proprietors to be secret, as to their contents. They expect to derive a profit from such secrecy. They are therefore liable for all injuries sustained by any one who takes their medicine in such quantities as may be prescribed by them. There is no way for a person who uses the medicine to ascertain what its contents are, ordinarily, and in this case the contents were only ascertained after an analysis made by a chemist, which would be very inconvenient and expensive to the public; nor would it be the duty of a person using the medicine to ascertain what poisonous drugs it may contain. He has a right to rely upon the statement and recommendation of the proprietor, printed and published to the world; and if, thus relying, he takes the medicine, and is injured on account of some concealed drug of which he is unaware, the proprietor is not free from fault, and is liable for the injury thereby sustained. It appears from the analysis made by the chemist in this case that this medicine contained 25 grains of the iodide of potash to two tablespoonfuls of the medicine. The testimony of the plaintiff, by witnesses learned in the profession of medicine, was that iodide of potash in this quantity would produce the effects upon a person using it shown by the condition of the defendant in error. The prescription accompanying the bottle directed the taking of one to two tablespoonfuls of the medicine, and this was done by the defendant in error, and he was thereby greatly injured and damaged.

Judgment affirmed.

Review of Blood Balm Co. v. Cooper:

1. State the essential facts.
2. What was the main question?
3. What would have been the result if the court below had awarded a nonsuit?
4. State the two defenses offered.
5. Why did it not make any difference that the medicine was not sold directly by the defendant to the plaintiff?
6. Why was it material that the contents of this medicine were concealed from the public generally?

7. In purchasing a proprietary medicine, why has the customer a right to rely on printed statements and recommendations of the manufacturer?
8. Are the reasons given in this case by the court clear and convincing?
9. Formulate a rule for the case.

Manufacturer of Candy Sued by Ultimate Consumer

Case:

BROWN CRACKER & CANDY CO. v. JENSEN.

Court of Civil Appeals of Texas, 1930. 32 S.W.(2d) 227.

The plaintiffs alleged that on January 14, 1929, plaintiff, Ruby Jensen, purchased from the retail store of defendant F. W. Woolworth Company some chocolate candy which had been manufactured and processed by defendant Brown Cracker & Candy Company for the purpose of resale to the public generally; that said chocolate so manufactured and processed by the Brown Cracker & Candy Company, and by it sold to F. W. Woolworth Company for the purpose of resale to the public, and some of which was sold at retail to Ruby Jensen, contained poison or other deleterious matter, which, when eaten by said Ruby Jensen, caused or produced serious and permanent injuries to plaintiff, Ruby Jensen.

Question: Whether the customer who is injured by candy may sue the negligent manufacturer, though there is no contractual relation between the plaintiff and defendant.

STANFORD, J. "That the acts of the Brown Cracker & Candy Company in the manufacturing of the candy in such form for sale to the retail trade, and the acts of Woolworth Company in offering it for sale in such form, constituted representations and warranties to Mrs. Jensen that the candy was pure, wholesome, ready for eating and would not injure or damage her, and that such representations and warranties were not true and that, in addition, the defendants were guilty of negligence in so manufacturing and selling such candy and as a proximate result of said acts the plaintiffs sustained damage as alleged, and that a part of the cause of action arose in Johnson County." The

above finding, we think, is supported by the evidence. Appellant does not attempt to show wherein said finding was not supported. We think the weight of authority is to the effect that an ultimate consumer may maintain an action directly against a negligent manufacturer for injuries from the use of a dangerous article such as unwholesome food or beverage, though there is no contractual relation between them.

Review of Brown Cracker & Candy Co. v. Jensen:

1. State the material facts.
2. Why was the F. W. Woolworth Company not a party to the suit?
3. State the question.
4. Why may the ultimate consumer maintain an action directly against the manufacturer?
5. Why was there no contractual relation between the parties to this suit?
6. State the rule in relation to the liability of the Brown Cracker & Candy Company.

Manufacturer Liable to Ultimate Consumer

Digest of Cases:

1. **Chemical Disinfectant Exploded.** That chemical disinfectant was sold by the manufacturer to traveling dealers who sold to consumers did not exonerate the manufacturer for an explosion causing personal injury. *W. T. Rawleigh Co. v. Shoultz* (C. C. A. 1932) 59 F.(2d) 148.

2. **Bottle Improperly Filled and Insecurely Corked.** A wholesale drug company, which delivered a bottle of concentrated ammonia to a retail drug store, owed a legal duty, not only to the public, but to a clerk in the retail drug store who was not a registered pharmacist, and whose eyes were injured by the escape of fumes from the bottle resulting proximately from the fact that the bottle was improperly filled and insecurely corked. *Texas Drug Co. v. Cadwell* (Tex. Civ. App. 1922) 237 S. W. 968.

3. **Substance Not Known to be Poisonous.** A manufacturer used a common mordant in dyeing certain cloth, by handling of which a purchaser was poisoned. At the time the mordant was not known to be poisonous to handle, and the injury involved was the first injury known from it. Held, that this was not sufficient evidence to justify a finding that the manufacturer was negligent in the performance of any duty to the customer. *Gould v. Slater Woolen Co.* (1888) 147 Mass. 315, 17 N. E. 531.

4. **Inherently Dangerous to Trees.** Manufacturer of compound inherently dangerous to orange trees held liable for injuries to orchard for use of such compound purchased through a middleman, and damages of \$700 per acre not excessive. *Kolberg v. Sherwin-Williams Co.* (1928) 93 Cal. App. 609, 269 P. 975.

Readings: Liability of Manufacturer to Ultimate Consumer.

1. Bug in Plug of Tobacco. *Liggett & Myers Tobacco Co. v. Cannon* (1915) 132 Tenn. 419, 178 S. W. 1009, L. R. A. 1916A, 940, Ann. Cas. 1917A, 179.
2. Sale of Impure Oil. *Meshbeshier v. Channellene Oil & Manufacturing Co.* (1909) 107 Minn. 104, 119 N. W. 428, 131 Am. St. Rep. 441.
3. Liability of Seller for Death of Live Stock. *Mossrud v. Lee* (1916) 163 Wis. 229, 157 N. W. 758, 17 N. C. C. A. 214.
4. Liability of Manufacturer for Pin in Sanitary Napkin. *La Frumento v. Kotex Co.* (1928) 131 Misc. 314, 226 N. Y. S. 750.
5. Liability of Manufacturer to Ultimate Consumer. 9 Texas Law Rev. 620, 621.

Manufacturers of Beverages

Safeguarding the health of its citizens is one of the outstanding duties of the state. For this reason manufacturers and bottlers of beverages have been subject to stringent regulations. The fact that a beverage is from any cause unfit for human consumption, or that a container is defective, due to negligence on the part of the bottler or manufacturer, makes him liable, as a rule, for injuries to a consumer who purchased from an intermediate dealer. Such things as bits of glass, cigar stubs, a decomposed mouse, and other things, disgusting as well as eminently dangerous to human life or health, found in bottled beverages, have brought liability to the bottler. An oft-quoted rule on this subject is: "That when a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be injurious."

Manufacturer Sued for Injury Caused by Broken Glass in a Beverage*Case:***WATSON v. AUGUSTA BREWING CO.**

Supreme Court of Georgia, 1905. 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157, 19 Am. Neg. Rep. 107.

Action by E. A. Watson against the Augusta Brewing Company. The Augusta Brewing Company sold to a merchant in Thomson, Ga., some of its soda water, which the merchant placed on sale. Some of this soda water was, with the permission of the merchant mentioned, taken from his stock by the plaintiff and drunk from the bottle. While drinking the soda water, plaintiff swallowed three pieces of glass, or perhaps more, without knowing it, and one large piece of glass lodged in plaintiff's throat. Plaintiff immediately went to a physician, who extracted from his stomach three pieces of glass; plaintiff having previously ejected from his throat the piece of glass which had lodged there. The bottle from which plaintiff drank the soda water was in good condition, and had no rough edges or other peculiarities which could put plaintiff on notice of the presence of the glass inside the bottle. The pieces of glass were in the bottle when it was filled.

- Questions:*
1. Is a manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing under a legal duty not negligently to allow a foreign substance, such as broken glass, to be present in the bottle when it is placed on sale?
 2. May plaintiff recover damages for mental suffering?

CANDLER, J. When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no foreign substance shall be mixed with the beverage which, if taken into the human stomach, will be injurious. The case of Woodward v. Miller, 119 Ga. 618, 46 S. E. 847, 64 L. R. A. 932, 100 Am. St. Rep. 188, is hardly in point; for in that case the manufacturer knew of the defect and fraudulently conceal-

ed it from the purchaser. *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324, while differing somewhat as to its facts, furnishes strong reasoning to support the principle announced. The composition of patent or proprietary medicines is usually shrouded in mystery, and it is generally understood that many such remedies contain ingredients which, if taken in sufficient quantities, will produce injurious results upon the person taking them. If, then, one who buys a patent medicine may rely upon the obligation of the manufacturer not to place therein ingredients which, if taken in the prescribed doses, will injure his health, certainly the purchaser of an alleged harmless and refreshing beverage should have the right to rest secure in the assumption that he will not be fed on broken glass. It does not matter that the plaintiff in the present case did not buy the soda water from the defendant, or that there was no privity of relationship between them. The duty not negligently to injure is due by the manufacturer, in a case of the particular character of the one under consideration, not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended. * * *

The only remaining point to be considered is whether or not the plaintiff in this case can recover for mental suffering growing out of his injury, and, if so, to what extent. It is a familiar principle that, where a physical injury has been sustained, the person injured may recover for mental suffering caused by or growing out of his bodily hurt. One may not recover, however, for mental suffering which is not reasonable, or which is merely fanciful. It can hardly be disputed that a reasonable fear of death constitutes mental suffering of a very keen sort. It is not unreasonable, we think, for one who has swallowed several pieces of glass to entertain a very vivid and poignant apprehension of an untimely end; and the mental anguish caused by this dread may constitute an element of damage in a suit for damages on account of the physical injury. But after the glass has been removed from his stomach, and he is apparently restored to his former condition of health and vigor, his fears, so far as a damage suit are concerned, should cease. He may not continue for an indefinite period to vex his soul with dread on account of having been "cut on the inside," and hold the defendant liable for his apprehensions. It follows, therefore, that so much of the petition as seeks to recover on account of mental suffering endured since the glass was removed from the plaintiff's stomach should be stricken.

Review of Watson v. Augusta Brewing Co.:

1. State the material facts.
2. What were the two principal questions?
3. What is the legal duty of one who manufactures and bottles beverages for sale?
4. Why did the case of Woodward v. Miller not apply?
5. To what extent was the case of Blood Balm Co. v. Cooper in point?
6. What is meant by the phrase "mental suffering"?
7. If in a particular case there has been a physical injury, then may the question of damages for mental suffering be considered?
8. What was the cause of mental suffering in this case?
9. Why was there no cause for damages for mental suffering after the glass had been removed from the body?
10. State the various rules in the case.

Foreign Substance in Plug of Tobacco Causes Injury*Case:***R. J. REYNOLDS TOBACCO CO. v. LOFTIN.**

Supreme Court of Mississippi, 1924. 99 So. 13.

COOK, J. This suit was instituted by T. L. Loftin, seeking to recover damages for an illness alleged to have resulted from chewing a part of a plug of "Brown's Mule" chewing tobacco which had been manufactured by the defendant, and in which there was imbedded the partially decomposed body of a small snake. There was a verdict and judgment for \$1,500, and from this judgment this appeal was prosecuted.

Question: Was the manufacturer liable for the injury suffered?

Held: The declaration is grounded upon negligence in the manufacture of the plug of tobacco. We find no reversible error in the admission or exclusion of evidence, or in the granting or refusal of instructions, and we think the testimony amply sustains the finding of liability. We think, however, that under the evidence as to the extent of the illness the verdict is grossly excessive, and that a verdict in excess of \$500 should not be permitted to stand.

If the appellee will enter a remittitur of \$1,000, the judgment of the court below will be affirmed for \$500; otherwise it will be reversed, in so far as it fixes the amount to be recovered, and the cause remanded for trial on the question of damages only.

Affirmed with remittitur.

Review of R. J. Reynolds Tobacco Co. v. Loftin:

1. Why was the suit instituted?
2. What are the material facts?
3. State the question.
4. On what theory of liability is the declaration grounded?
5. Why were the damages excessive?
6. State the holding of the case.

Readings: Why Manufacturer is Liable to Ultimate Consumer. Implied Warranty When Sold for Consumption. Plaintiff purchased and then drank from bottle of beverage in which there was a worm. It was held that a sale of food or beverages impliedly warrants that it shall be free of foreign matter which may be injurious to the well being of the customer. *Nock v. Coca-Cola Bottling Works of Pittsburgh* (1931) 102 Pa. Super. Ct. 515, 156 A. 537.

Warranty of Manufacturer of Beverages

In *Rainwater v. Hattiesburg Coca-Cola Bottling Co.* (see readings), the court in the syllabus said: "A manufacturer or bottler of beverages impliedly warrants that the beverages manufactured or bottled by him are wholesome and fit for human consumption, and is liable to a consumer for damages suffered by reason of drinking an unwholesome beverage manufactured or bottled by him, although it was purchased by the consumer from a middleman and not direct from the manufacturer or bottler."

This so-called warranty imposes a great liability on the manufacturer or bottler, and makes it easy for an injured customer to recover damages. In a few states the liability depends not upon the implied warranty, but upon the negligence of the defendant. Where negligence is the basis of the defendant's liability, it is necessary for the plaintiff to plead and prove the acts of negligence or carelessness of the manufacturer or bottler.

Manufacturer of Beverages Liable for Negligence

In *F. M. Hasbrouck v. Armour & Co.* (see readings), the liability of the manufacturer is based upon his negligence and not upon an implied warranty, in these words: "A manufacturer or vendor making and selling an article intended to preserve or affect human life is liable to third persons who sustain injury caused by his negligence in preparing, compounding, labeling, or directing the use of such articles, if such injury to others might have been reasonably foreseen in the exercise of ordinary care. The reason for these rules is apparent. The manufacturer or vendor should have no immunity from duties common to all, merely because he is a manufacturer or vendor. At the same time, there is in the common law no authority for imposing special duties upon him by reason of any privity between him and the vendee of his vendee, except in instances mentioned, which may be regarded as occasions of a general duty toward the public to whom the wares are offered, or as exceptions to the rule of non-liability."

Cigar Stub in Beverage Caused Injury

Case:

· *BOYD v. COCA COLA BOTTLING WORKS.*

Supreme Court of Tennessee, 1915. 132 Tenn. 23, 177 S. W. 80.

Action by W. C. Boyd and wife against the Coca Cola Bottling Works.

Mrs. Lou Boyd examined the bottle and found therein a cigar stub about two inches long which had apparently been in the liquid for some time. It was shown on the trial that complaint was made by Mr. Boyd to an agent of the Coca Cola Bottling Works about the incident referred to and this agent expressed regret and indignation and said that the company had employed some negroes who were careless about washing bottles into which Coca Cola was poured. The proof shows that it was the custom of defendant company to buy empty bottles around town and refill them. A physician testified for plaintiff below as to the poisonous effect of a fluid impregnated with nicotine from a cigar stub.

- Question:* 1. Was the consumer negligent for failure to examine the bottle of Coca Cola for poisonous substances, where the bottle was sealed when bought of the dealer, and especially where the bottle and the fluid were both of a dark color?
2. Can the consumer recover damages from the manufacturer under the statement of facts?

GREEN, J. Upon a person who undertakes the performance of an act, which if not done with care and skill will imperil the lives of others, the law imposes the duty of exercising the requisite care and skill. In such matters such a person is liable to others suffering from his negligence.

This liability does not depend on contract or privity, but arises from a breach of the legal duty to which we have just referred. A tort is committed, a legal right invaded, by practices which prejudice another's health.

Upon the principles stated, a negligent manufacturer has been held liable for injuries to consumers, purchasing from intermediate dealers, for the careless labeling of poisons and patent medicine.

So when the manufacturer of this beverage undertook to place it on the market in sealed bottles intending it to be purchased and taken into the human stomach under such circumstances that neither the dealer nor the consumer had opportunity for knowledge of its contents, he likewise assumed the duty of exercising care to see that there was nothing unwholesome or injurious contained in said bottles. For a negligent breach of this duty, the manufacturer became liable to the person damaged thereby.

Practically all the modern cases are to the effect that the ultimate consumer of foods, medicines or beverages may bring his action against the manufacturer for injuries caused by the negligent preparation of such articles. This is certainly true where the articles are sold in sealed packages and are not subject to inspection. Some of the cases place the liability on the grounds heretofore stated. Others place it on pure food statutes, others say there is an implied warranty when goods are dispensed in original packages, which is available to all damaged by their use, and another case says that the liability rests upon the demands of social justice.

Review of Boyd v. Coca Cola Bottling Works:

1. What are the important facts?
2. State the questions involved.
3. Upon what does the liability of the manufacturer depend?
4. What difference did it make that the beverage was in a sealed bottle?
5. State the reasons given why an ultimate consumer may have an action against the manufacturer.

Mouse in Bottled Drink Caused Injury*Case:***JACKSON COCA COLA BOTTLING CO. v. CHAPMAN.**

Supreme Court of Mississippi, 1914. 106 Miss. 864, 64 So. 791.

Action by Harry Chapman, by his next friend, Nellie Chapman, against the Jackson Coca Cola Bottling Company. Appellee drank Coca Cola from a bottle containing a dead mouse.

REED, J. There is evidence for appellant that its system for cleansing and filling bottles is complete, and that there is watchfulness to prevent the introduction of foreign substances. Nevertheless the little creature was in the bottle. It had been there long enough to be swollen and undergoing decomposition when the bottle was purchased from a grocer and opened by appellee. Its presence in the bottle was not discovered until appellee had taken several swallows. An odor led to the discovery. Further events need not be detailed. Appellee says he got sick. Suffice it to say he did not get joy from the anticipated refreshing drink. * * *

The record discloses sufficient evidence to sustain the jury's verdict for appellee. There is no error for reversal. Appellant company bottled the coca-cola for the retail trade to be sold to the general public as a beverage refreshing and harmless. The bottle in this case was purchased by the grocer from appellant.

We find the law pertinent to this case clearly stated by Judge Candler in the case of *Watson v. Augusta Brewing Company*, 124 Ga. 121, 52 S. E. 152, 1 L. R. A. (N. S.) 1178, 110 Am. St. Rep. 157, as follows: "When a manufacturer makes, bottles, and sells to the retail trade, to be again sold to the general public, a beverage represented to be refreshing and harmless, he is under a legal duty to see to it that in the process of bottling no

foreign substance shall be mixed with the beverage, which, if taken into the human stomach, will be injurious." In that case it is further held that this duty the bottler owes to the general public for whom his drinks are intended as well as to the retailer to whom he sells.

Affirmed.

Review of Jackson Coca Cola Bottling Co. v. Chapman:

1. Give the important facts.
2. Why did not the care and caution exercised by the appellant constitute a complete defense?
3. Does the rule in the case of *Watson v. Augusta Brewing Co.* apply?

Readings: Liability of Manufacturer or Bottler of Beverages.

1. Manufacturer of Bottle Liable for Damages. *Payne v. Rome Coca-Cola Bottling Co.* (1912) 10 Ga. App. 762, 73 S. E. 1087.
2. Manufacturer did Not Knowingly Use Defective Bottles. *Stone v. Van Noy Railroad News Co.* (1913) 153 Ky. 240, 154 S. W. 1092.
3. Rat in Bottle. *Coca-Cola Bottling Co. v. Barksdale*, (1920) 17 Ala. App. 606, 88 So. 36.
4. Based on Negligence Only. *Crigger v. Coca-Cola Bottling Co.* (1915) 132 Tenn. 545, 179 S. W. 155, L. R. A. 1916B, 877, Ann. Cas. 1917B, 572, 11 N. C. C. A. 359.
5. Mental Anguish as an Element of Damages. *Martin v. Waycross Coca-Cola Bottling Co.* (1916) 18 Ga. App. 226, 89 S. E. 495.
6. Spider in Beverage. *Jackson Coca-Cola Bottling Co. v. Renna* (Miss. 1923) 97 So. 674.
7. Based on Warranty. *Rainwater v. Hattiesburg Coca-Cola Bottling Co.* (1923) 131 Miss. 315, 95 So. 444.
8. Manufacturer of Soap. *Hasbrouck v. Armour & Co.* (1909) 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876.
9. Doctrine of *Res Ipsa Loquitur* as applied to Bottled Pop. *Nehi Bottling Co. v. Thomas* (1930) 236 Ky. 684, 33 S.W.(2d) 701.
10. Liability for Injuries Due to Presence of Disgusting or Filthy Substances in Food, Tobacco, or Bottled Goods. 11 N. C. C. A. 359-365.

Beverages—Explosion of Bottle.

A manufacturer who puts up highly charged beverages for the general trade is liable to the consumer who is injured by a bursting bottle. It is the duty of the manufacturer to know what precautions are necessary to prevent explosions. For example, the fact that in the past bottles had broken by reason of being too heavily charged with gas should be sufficient warning. It has been held that a manufacturer of soda pop and charged waters owes a duty of care toward its employees as well as to its prospective purchasers, and will be held liable for injury resulting from the explosion of a surcharged bottle.

Manufacturer of Pop Bottles—Explosion

Adeline Smith, an employee at a roadside stand, was standing by the receptacle in which beverages were kept on ice for sale, and a bottle filled with carbonated cream soda exploded and injured her right eye. The company which manufactured the pop bottles and sold them to the bottlers was liable for the injuries caused by the explosion, where the bottles were defective and the inspection inadequate. *Smith v. Peerless Glass Co., Inc.* (1931) 233 App. Div. 252, 251 N. Y. S. 708, and 11 B. U. L. Rev. 578-581.

Readings: Liability for Injury Caused by Explosion of Bottle or Container.

1. Ginger Ale Bottle Exploded. *Grant v. Graham Chero-Cola Bottling Co.* (1918) 176 N. C. 256, 97 S. E. 27, 4 A. L. R. 1090.
2. Liability of Manufacturer of Carbonated Bottled Beverage for Injury to Third Person. 88 *Central Law Journal*, 19-20.
3. Evidence of Similar Explosions to Prove Negligence. *Dail v. Taylor* (1909) 151 N. C. 284, 66 S. E. 135, 28 L. R. A. (N. S.) 949.
4. Actionable Negligence in Overcharging Bottles. *Colyar v. Little Rock Bottling Works* (1914) 114 Ark. 140, 169 S. W. 810.
5. No Negligence in the Act of Bottling. *O'Neill v. James* (1904) 138 Mich. 567, 101 N. W. 828, 68 L. R. A. 342, 110 Am. St. Rep. 321, 5 Ann. Cas. 177.

6. Doctrine "*Res Ipsa Loquitur*" Applied to Explosion of Gases. *Stolle v. Anheuser-Busch, Inc.* (1925) 307 Mo. 520, 271 S. W. 497, 39 A. L. R. 1001.

Hair Dye—Hair Wash

A number of cases have arisen in which the use of a hair dye or hair wash has caused serious injury to the user. Then who is liable, the retailer or the manufacturer? The retailer generally is not liable unless some special duty is imposed upon him, or he assumes some special duty in relation to the drug sold, and fails to perform that duty. If the retailer purports to be the manufacturer, then he assumes responsibility.

The manufacturer may be liable, as is shown by the quotation from 203 N. Y. S. 1 (see readings): "We have a case of a woman, in perfect health, who goes to a hair dresser to have her hair dyed. The latter recommends defendant's preparation, which she has bought from it, and which she applies exactly as directed by the defendant's printed instructions. This preparation defendant represents to be absolutely harmless except under conditions not here present. Plaintiff then suffers painful and serious injuries, as the direct result of the dye thus applied, which her physician testifies, in effect, is the competent producing cause of these injuries, and the sole possible one. This in my opinion, made out a *prima facie* case for plaintiff, and adequately sustained the burden of proof she had to assume."

Use of Hair Dye and Suit for Alleged Injury

Case:

KARR v. INECTO, INC.

Court of Appeals of New York, 1928. 247 N. Y. 300, 160 N. E. 308.

The defendant manufactures a chemical product known as Inecto Rapid. It offers that product for general sale, representing to the public that it may be used as a hair dye and applied to the head. The plaintiff conducts an establishment for the dressing and dyeing of women's hair and for what she describes as "general beauty culture work." The plaintiff always wore gloves while applying dye to a customer's head. She did so on this occasion. After she removed her gloves she washed her hands with soap. Then she saw that a few drops of the dye were trickling down her customer's forehead. The plaintiff

wiped the dye off the forehead with a piece of cotton. Some of the dye stained the plaintiff's index finger. The plaintiff washed her hands again. The stain still remained. That night at 2 o'clock the plaintiff awoke. Her finger was red, swollen, and painful. She called a doctor, the finger grew worse. Several operations were performed upon it. The plaintiff has never regained the full use of the finger.

Question: What must the plaintiff be able to show before she can recover for the alleged injury?

LEHMAN, J. Before the plaintiff may recover she must show, first, that the injury to the finger resulted from contact with the chemical product manufactured by the defendant; second, that the chemical product was inherently dangerous and poisonous; and, third, that the defendant was negligent in putting upon the market a dangerous and poisonous product. If the evidence establishes that the liquid contained in the bottles of dye used by the plaintiff was dangerous and poisonous, then from the fact that the injury followed contact with the dye we might draw the inference that the injury was the result of that contact. In such case, too, we might, without further evidence as to how these particular bottles happened to contain a dangerous and poisonous liquid, infer that such a condition could not have arisen without fault on the part of employees of the defendant. As the foundation of her cause of action, the plaintiff must show by direct or circumstantial evidence at least that the bottles of dye manufactured by the defendant and used by the plaintiff contained a dangerous and poisonous liquid.

There is no direct evidence of the nature of the dye contained in these bottles. We are asked to draw the inference that the liquid was dangerous because the staining of the right index finger was followed by a morbid condition on the same finger.

* * *

Doubtless there are cases where a condition is so closely linked to an antecedent occurrence that the inference that the condition was the result of the occurrence may logically be drawn, even though there is otherwise no evidence as to whether the occurrence might be a competent producing cause of the condition. That is, of course, true wherever other possible causes are excluded. Such was apparently the situation in *Cahill v. Inecto, Inc.*, 208 App. Div. 191, 203 N. Y. S. 1. In the case now under consideration the morbid condition became apparent only twelve hours after the finger became stained. We are not informed

how long after a chemical poison is applied the tissues break down as they are said to have broken down here; we are not informed as to the nature of the chemical irritant or poison which might produce such a condition; we are not informed whether such chemical poisons or irritants are at times found in hair dyes, and are always absent from soaps, massage creams, and other articles which the plaintiff uses in her business or household work. We are asked to draw the inference that the "chemical poison or irritant" which it is said caused injury to the plaintiff was contained in the "chemical product" of the defendant merely because the injury occurred on the finger which was stained by the dye twelve hours before though possibility of other cause is not excluded, and though there is no direct evidence that the "chemical product" contained any chemical poison or irritant. * * * Then we are asked to go further and find that the dye not only caused the injury, but was so inherently dangerous that the defendant was negligent when it put the bottle on the market, though dye from exactly the same bottle produced no harmful effect upon the customer. We do not find that the evidence sustains such inferences.

Review of Karr v. Inecto, Inc.:

1. State the facts out of which the lawsuit arose.
2. What was the question involved?
3. In order to recover, what must the plaintiff be able to prove?
4. How could the plaintiff prove that the bottle of hair dye contained dangerous or poisonous liquid?
5. Was there any evidence of negligence on the part of the defendant?
6. Was there any evidence that the dye caused the injury?

Readings: Hair Dyes and Hair Washes.

1. Cahill v. Inecto, Inc. (1924) 208 App. Div. 191, 203 N. Y. S. 1.
2. George v. Skivington (Eng. 1869) L. R. 5 Exch. 1, 13 A. L. R. 1184 (brief summary).
3. Beauty Shop Customer Sustained Scalp Burns. Davis v. Graves, 250 Ky. 654, 63 S.W.(2d) 803.
4. Electrical Appliance Burned Scalp. Sebastian v. Jenness (1931) 16 La. App. 158, 133 So. 468.
5. Loss of Hair and Scar on Scalp as Elements of Damage. Egan v. Mudd (1932) 262 Ill. App. 373.

The Law Imposes a Duty Where an Article is Inherently Dangerous

Again it is necessary to stress the fact that it is the duty of every one to have a reasonable regard for the preservation of human life and for the prevention of bodily injury. For this reason a person must so conduct his business as not knowingly or negligently to expose any one to danger. It is evident, then, that a druggist manufacturing an inherently dangerous article owes it to the public to exercise care in its distribution commensurate with the danger involved. This duty is not restricted to those persons with whom he has contracted, but extends to the persons and property of others who might be injured by his want of care. The violation of this duty may constitute actionable negligence and may arise from contract, but not necessarily so. If a manufacturing druggist negligently puts into circulation some noxious or imminently dangerous thing, likely to cause serious injury to any person into whose hands it may come, he is liable. It is evident that explosives and poisons not properly labeled, as well as many other substances, are among the articles listed as inherently dangerous.

Readings: Duty Imposed Where Thing is Inherently Dangerous. Pyroxoloid combs used by hairdresser are inherently dangerous. *Farley v. Edward E. Tower Co.* (1930) 271 Mass. 230, 171 N. E. 639, 86 A. L. R. 941.

Manufacturer's Liability on Sale of Explosives

The sale of explosive oils frequently comes within the province of the druggist. Mistakes in the sale of such oils have many times resulted in injuries to persons and property. The rule for liability in such cases is clearly expressed in *Wellington v. Downer Kerosene Oil Co.* (1870) 104 Mass. 64, as follows: "It is well settled that one who delivers an article which he knows to be dangerous or noxious, to another without notice of its nature and qualities, is liable for an injury which might reasonably be contemplated as likely to result therefrom to that person, or any other, who was not himself at fault."

Manufacturer Liable to Third Persons on Resale of Dangerous Article

Pyroxoloid combs used by a hairdresser took fire while a customer's hair was being dried by hot air, and the manufacturer was held liable though there had been intermediate sales. The court said that "it is settled that a person who sells an article, which he knows is inherently dangerous to human life, limb or health, to another person, who has no knowledge of its true character, and fails to give notice to the purchaser, is liable in damages to a third person who, while in the exercise of due care, is injured by a use of it which should have been contemplated by the seller." *Farley v. Standard Pyroxoloid Corporation*, 271 Mass. 230, 171 N. E. 639, 86 A. L. R. 941.

Manufacturer Liable on Explosion of Chemical Disinfectant

A chemical disinfectant was sold by the manufacturer to traveling dealers who sold to consumers. When the wife of the purchaser picked up from the shelf the bottle of disinfectant, it exploded and destroyed the sight of one eye. The defendant was not free from liability to the plaintiffs because the article was not sold direct by the defendant to them. *W. T. Rawleigh Co. v. Shultz* (C. C. A. 1932) 56 F.(2d) 148.

***Readings:* Sale of Explosives.**

1. Gasoline Sold Instead of Kerosene. *Cohn v. Saenz* (Tex. Civ. App. 1919) 211 S. W. 492.
2. Substitution of Gasoline for Kerosene, and Recovery of \$7,500 Damages. *Kearse v. Seyb* (1919) 200 Mo. App. 645, 209 S. W. 635.
3. Stove Polish. *Clement v. Crosby & Co.* (1907) 148 Mich. 293, 111 N. W. 745, 10 L. R. A. (N. S.) 588, 12 Ann. Cas. 265.

Manufacturer Liable to Person Who is Neither Consumer nor User

The manufacturer has frequently been held liable for injury to the ultimate consumer or user, and the question arises as to whether he is legally responsible for injury caused by his product to one who is neither. This query was answered in the af-

firmative in a New Jersey case (1927). Christiana Noonan went to the store of the defendant to purchase groceries. While she was there a ginger ale bottle which one of the clerks was selling to another customer exploded, and she was struck by a piece of flying glass. She sued both the storekeeper and the Fairmont Bottling Company. Evidence was produced to show that the ginger ale was bottled under a pressure of fifty pounds whereas thirty-five pounds was the maximum a bottle of the kind used could stand without exploding. In this case recovery was allowed against both the manufacturer and the storekeeper. *Noonan v. Great Atlantic & Pacific Tea Co.* (1927) 135 A. 822, 5 N. J. Misc. 201.

Sale by Retailer in Small Quantities from Larger Bulk on Which Manufacturer had Placed Wrong Label

An interesting question as to liability arises where a retail druggist orders a large quantity of a drug, and a package so labeled is sent him, but by mistake of the manufacturer a different drug is substituted. The retailer breaks the original package and places the drug in his own jar from which he retails it. The manufacturer is liable for his own error. If there is no negligence on the part of the retailer, he is not liable. If the drug is of the same color as the one ordered and with no outward manifestations to put the retailer on his guard, the sale of the drug will not make him liable, but, if the facts are such that he should detect the mistake, he may be sued for his failure to exercise due care.

When Retail Druggist Assumes to be a Manufacturer

There may be an advertising advantage to a retail druggist to become a manufacturer of some drug, or to hold himself out to the world as such by placing his label on some drug manufactured by another. Be this as it may, a liability also attaches to a retailer who assumes to be a manufacturer. He then becomes liable as a manufacturer for any injury occasioned by the drug. It is negligence on his part not to know the contents and effect of the drug or drugs. Any exemption from liability which he might have as a seller of patent or proprietary medicines in their original packages is abrogated by his assumption of being the manufacturer.

Retailer Purports to be the Manufacturer of Drug Sold**Case:****WILLSON v. FAXON, WILLIAMS & FAXON.**

Court of Appeals of New York, 1913. 208 N. Y. 108, 101 N. E. 799,
47 L. R. A. (N. S.) 693, Ann. Cas. 1914D, 49.

Action by Fannie E. Willson for damages. The defendant is a domestic corporation engaged in selling drugs and medicines in the city of Buffalo. The plaintiff purchased at its store a box of medicinal pills, on the label of which, in addition to the usual descriptive matter, there appeared the name of the defendant as manufacturer and his store address. The plaintiff made use of the tablets and later developed a case of mercurial salivation, and an examination of the tablets proved that each tablet contained one-fifth of a grain of calomel combined with senna and podophyllin.

In New York there was the statute (Public Health Law [Consol. Laws 1909, c. 45] § 235, subd. 2): "Every proprietor of a wholesale or retail drug store, pharmacy, or other place where drugs, medicines, or chemicals are sold, shall be held responsible for the quality and strength of all drugs, chemicals or medicines sold or dispensed by him, except those sold in original packages of the manufacturer, and those articles or preparations known as patent or proprietary medicines."

Question: When a retail druggist holds himself out to purchasers of a proprietary medicine as the actual manufacturer thereof, can he claim the protection of the above statute?

WILLARD BARTLETT, J. It is plain that if the sale had been made by the manufacturers themselves, Billings, Clapp & Co., of Boston, the fact that Kascara Kathartics were comprehended within the class of patent or proprietary medicines would not in any wise have absolved Billings, Clapp & Co. from responsibility for the strength and quality, which, of course, includes the character of the compound. I think that, when the defendant represented to the plaintiff by means of the statement contained in the label on the box that Faxon, Williams & Faxon were the manufacturers of the preparation, it rendered itself just as liable to the purchaser as the actual manufacturers would have been if the purchase had been made from them. In other

words, the defendant, by reason of this representation, became responsible to the plaintiff for the strength and quality of the preparation notwithstanding its patented or proprietary character; and, if the compound contained an injurious substance instead of being purely vegetable as the label declared, the defendant became liable in law for the injury suffered by the purchaser in consequence of ignorantly taking the concealed poison.

Review of Willson v. Faxon, Williams & Faxon:

1. State the facts.
2. Give the substance of the New York statute.
3. What question arose out of the facts?
4. Why was the retailer liable?
5. What representations were made by the defendant?
6. Formulate a rule for the case.

Phosphorus Sold on a Written Order through the Mails

Case:

GIBSON v. TORBERT.

Supreme Court of Iowa, 1901. 115 Iowa, 163, 88 N. W. 443, 56 L. R. A. 98, 91 Am. St. Rep. 147.

Action to recover for physical injuries claimed to have resulted from the defendant's negligence. Given in narrative form, the plaintiff alleges: That he is a man of middle age and of very limited education, and at the time of the transaction in question he was, and always had been, ignorant of the character and properties of phosphorus. That the defendant was a wholesale druggist, dealing in phosphorus and possessed of scientific knowledge of, and was familiar with, its character and properties. That said drug in its commercial form is but little used, and its nature and properties are not generally known to the public. That in such form it is a highly drastic, corrosive, and deadly poison, and is highly explosive and combustible, being liable at all times when removed from water "to explosion and spontaneous combustion, either by ignition from contact with fire, by the application of force, or from chemical changes effected by contact with air." That in fact it is a "most dangerous and deadly nuisance." That, having heard that said drug was employed by actors and stage managers as a harmless illuminant, and desiring to know more about it, he sent an order in writing to the defendant for a small quantity thereof, in words and figures as follows: "Iowa Falls, —4—3—97. W. H. Tor-

bert Dubuque, Iowa. Dear Sur, Mr. Swortz Gave me your Address and advised me To Rite to you and that you would send me what I wanted as he had not Got it Will you Please send me 50c worth of Phos Phorus By express to Colect on Delever and if it works as I Think it will Thare will Bee a Big Demand for it Let me Know Pleas if you Have not got it whare I can Get it By Return male your Truley W. M. Gibson, Iowa Falls Iowa." That said letter was in his own handwriting, and was poorly written with a lead pencil. That in response thereto the defendant caused a glass bottle "containing three sticks of phosphorus immersed in water to be shipped by express to plaintiff, labeled "Phosphorus," but without any other written directions or warning whatsoever accompanying it. That after receiving the package he removed the phosphorus from the bottle, and proceeded to examine and handle the same. "That, while holding two of said bars in his hands, by accident one of the bars slipped from his hand and fell upon the carpet of the floor in his home." That, "on stooping to pick it up, it exploded, scattering spray and molten quantities of its substance upon his hand, which instantly burned, and at the same time ignited and exploded the bar which was being held in his other hand." "That defendant was fully aware of all said danger; that there was constantly an imminent probability that said drug would act as herein explained, under similar circumstances; and that such facts, and all its dangers, were unknown to the general public, and probably unknown to plaintiff."

Question: Whether a druggist who received a written order for phosphorus and sent it to the writer, properly packed in water and labeled, was guilty of negligence because he did not explain the properties of the phosphorus.

SHERWIN, J. We believe the true rule deducible from reason and from authorities is that when a person who has reached the age of discretion, and who is apparently in the possession of his mental faculties, applies to a druggist for a certain drug, he represents to the dealer, by implication, at least, that he knows its properties and uses, and that he is a fit person to whom sale thereof may be made, and that unless there is something connected with the transaction, or something previously known to the seller, indicating that the would-be purchaser cannot safely be intrusted with the substance, a sale of the substance called for may be made without explaining its properties or the manner in

which it may be safely used or handled, and that, under such circumstances, the seller is not liable in damages for injuries to the purchaser resulting from the improper use or handling of the article, no matter how little knowledge the purchaser may in fact have had of its properties, or of the manner in which it could not be safely used or handled. It appears clear to us that the vendor's legal duty to such a purchaser can go no further than to give him the identical substance he calls for. Let us now apply this rule to the facts in this case. Phosphorus is one of the elements of matter that was discovered more than 200 years ago,—in fact, its illuminating properties were discovered as early as 1680; and it has been used for different purposes, to a limited extent, ever since its discovery. Since 1835 its principal use has been in the manufacture of matches. For years this latter use has been a matter of common knowledge to children, even; and there are but few adults of ordinary observation or intelligence who are not familiar with this use, and of its peculiar quality of emitting light. It is also generally known to be a deadly poison when taken internally. It is contended, however, that the plaintiff's letter ordering phosphorus is so illiterate that it alone would convey to a man of ordinary care information that the plaintiff was not a suitable person to intrust with the drug without specific warning as to its dangerous properties; but we cannot accept this construction of the letter, nor the inference sought to be drawn therefrom. On the contrary, we think the letter itself, with all its indications of illiteracy, was an assurance to the defendant, to a certain extent, at least, that the writer knew the substance he was ordering. It will not do to say that a man who may not be able to correctly compose or to correctly spell, or whose writing is poor, is unfit to be intrusted with dangerous substances; for some, at least, of the great inventive geniuses of the world have been deficient in all of these respects.

Review of Gibson v. Torbert:

1. What was the object of the action?
2. State briefly the material facts.
3. When a customer manifests such ignorance, what special caution would be advisable?
4. State the specific question.
5. Why was the defendant not liable?
6. Why was the article not sent through the United States mail?
7. Give a brief discussion of the uses of phosphorus.

Implied Warranties in Sale of Articles by Trade-Name

Where there is a sale of a specified article which has a patent or trade-name, are there any implied warranties of quality? Does the seller in such a case warrant either the merchantability of the article or its fitness for any particular purpose?

At common law in a sale of "known, described and definite articles" or of "specified goods" the seller impliedly warrants their merchantability (unless the contract provides otherwise) where the buyer reasonably relies on the seller's judgment, either because of lack of knowledge of the quality of the goods or lack of an opportunity for their inspection which should have revealed the defect. In other words, in such cases the seller impliedly warrants that the article shall be reasonably appropriate for the general purpose for which it is produced and sold. This is also the general rule in the states which have adopted the Uniform Sales Act.

The Uniform Sales Act, which is the law in more than thirty states, provides that "In the case of a contract to sell or a sale of a specified article under its patent or trade name, there is no implied warranty as to its fitness for any particular purpose." However, the courts have held that this provision substantially re-enacts the common-law rule which imposes on the seller of such an article the obligation of an implied warranty of fitness under certain circumstances. Therefore the circumstances of the sale must be looked to in order to determine whether in any particular case a warranty of fitness is to be implied.

The circumstances under which the sale of a patent or trade-name article usually occurs are these: (1) The customer may buy a specified article by its patent or trade-name without telling the seller the purpose for which it is to be used; (2) the customer may, in buying the article by its trade-name, incidentally inform the seller of the purpose for which it is to be used; (3) the customer may tell the seller the particular purpose for which an article is to be purchased and may then ask the seller if such and such a trade-name article will serve that purpose; and (4) the customer may first tell the seller the purpose for which an article is to be used and ask the seller to supply some article to serve this purpose, and the seller may then recommend and sell a trade-name article.

Where the circumstances are as stated under (1) and (2), there is no implied warranty of fitness for any particular purpose; the reason being that under such circumstances the buyer

has relied on his own judgment as to fitness and not on the seller's. Where, however, the circumstances are as stated in (3) and (4), there is an implied warranty of fitness to serve the purpose specified by the customer, since the buyer has not been content to rely on his own judgment, but has instead relied upon the judgment of the seller.

**Implied Warranty of Fitness Where Trade-Name Goods
were Sold for Specific Purpose**

Case:

IRELAND v. LOUIS K. LIGGETT CO.

Supreme Judicial Court of Massachusetts, 1922. 243 Mass. 248,
137 N. E. 371.

Suit for injury caused by glass in cold cream.

Plaintiff went to defendant's store and asked for a particular kind of cold cream which she was accustomed to use. The clerk informed her that the defendant did not have it in stock, but that they had "a cream of their own * * * which was superior to the one which she had been using" and which was "pure and healthful." Relying on his recommendation, she purchased two jars in cartons. Both cartons and jars were labeled, "Riker's Violet Cerate for the Complexion, a Soothing, Healthful Face Cream. Ricker Laboratories, Inc., Distributor." The plaintiff while using the cream rubbed some of it in her hand and a piece of glass in the cream lodged in the palm of her hand. She sued to recover for breach of implied warranty.

Question: Did the defendant escape liability because the clerk had recommended and sold an article having a trade-name, if the buyer did not rely on the trade-name but upon the recommendation of the seller?

JENNY, J. An implied warranty or condition that goods are reasonably fit for the purpose for which they are bought arises where the buyer expressly or by implication makes known to the seller the particular purpose for which they are required and where he relies on the seller's skill or judgment, whether the latter is the manufacturer or not, unless he—the buyer—has examined the goods and the defect is one which an examination would have revealed, and unless the contract is for the sale of a specified article under its patent or other trade name. * * * The existence of such a warranty is not negatived where the purchaser of

an article, for a definite purpose rather than of a particular kind of merchandise, relies on the seller to supply him with something adapted to that end; the latter in that case does not escape liability by the recommendation and subsequent sale of an article having a trade name.

Review of Ireland v. Louis K. Liggett Co.:

1. What injury had the plaintiff suffered?
2. Why did the customer ask for a particular kind of cream?
3. How strongly did the clerk recommend the cream he had for sale?
4. Did the purchaser rely on the recommendation of the clerk?
5. Did the trade-name have any influence in inducing the customer to buy the particular kind of cream?
6. Why was the retailer liable when the article sold had a trade-name?
7. If the druggist had sold the article called for under its trade-name and the same kind of an injury had resulted, would he have been liable?
8. What conduct made the druggist liable in this case?

Readings: Implied Warranties When Goods Sold by Trade-Name.

1. Implied Warranties in the Sale of Goods by Trade-Name. 11 Minn. Law Rev. 485-503.
2. Sale of Articles under Trade-Name Carries No Implied Warranty of Fitness for a Particular Purpose. *Ætna Chemical Co. v. Spaulding & Kimball Co.* (1924) 98 Vt. 51, 126 A. 582.
3. No Implied Warranty of Fitness in Sale of Stove Polish under Its Trade-Name. *Neigenfind v. Singer* (1923) 227 Ill. App. 493.
4. Sale is under a Patent or Trade-Name. *Vold on Sales*, 462-464.

CHAPTER 12

DISCLOSURE OF INGREDIENTS

Ingredients—Disclosure of

A state statute or a city ordinance may require the registration of a statement of the ingredients of patent medicines with the proper authorities. It is true that the patent laws give inventors exclusive rights to their inventions, but this does not imply a right to disregard laws enacted to promote the welfare of the whole people. Laws requiring the disclosure of ingredients are for this purpose, and are in no wise an unwarranted interference with trade. Such disclosure of ingredients of medicines or remedies prepared or sold by druggists is for the prevention of fraud and the sale of worthless articles.

In the case of *Fougera & Co. v. New York* (see readings) the court says: "The plaintiff is engaged in the importation and sale, both wholesale and retail, of proprietary and patent medicines. The names of many of the medicines are stated in the record. For some the plaintiff is the exclusive importer and sole distributor in the United States. It does not know the names of the ingredients, and cannot ascertain them. They are secrets closely guarded by foreign manufacturers. In these circumstances, it insists that the ordinance is void. There are two lines of attack. The ordinance so said in the first place to infringe rights secured to the plaintiff by the state and federal constitutions. * * * The argument is made that the ordinance is an arbitrary exercise of the power of government. We do not think so. Its purpose and effect are well within the limits of the police power. The purpose is the preservation of the public health and safety. The form of protection is publicity. There must be disclosure of the truth to responsible officials, who will prevent or punish the sale of fraudulent or noxious compounds. If that is not a legitimate public aim, we are at a loss to know where one may be found. * * * Disclosure is to be made to the health officers of the city and to them only. If fraud or other wrong is discovered, then and then only exposure will result."

Readings: Compulsory Disclosure of Materials of Ingredients.

1. Registration of Ingredients of Patent Medicine. *Fougera & Co. v. City of New York* (1918) 224 N. Y. 269, 120 N. E. 642, 1 A. L. R. 1467.
2. Requiring Disclosure of Ingredients of Stock Foods. *Savage v. Jones* (1912) 225 U. S. 501, 32 S. Ct. 715, 56 L. Ed. 1182.
3. Statute Which Embraces All Articles of Food and Drink is too General. *Dorsey v. State* (1898) 38 Tex. Cr. R. 527, 44 S. W. 514, 40 L. R. A. 201, 70 Am. St. Rep. 762.

Purchaser does Not Assume Risk though Statement of Ingredients is on Container

Digest of Case:

One not a physician, who purchased and used an eyewash recommended by the maker for use as a home remedy and bearing a statement on the container that it was harmless, cannot be held, as a matter of law, to have assumed the risk because a statement of the ingredients was also given. *Valmas Drug Co. v. Smoots* (C. C. A. 1920) 269 F. 356.

Regulating the Manufacture or Sale of Harmless Drugs

Since so much of the litigation concerning drugs and druggists has been about poisons and harmful drugs, one might think that this is the only field for regulation by law. In reality, the state has authority to regulate the manufacture or sale of harmless drugs in many ways. It is evident that, though harmless, it may be expedient to have some regulation as to the fitness of persons so selling and of places of sale. As the public welfare is involved, more or less, in the sale of all drugs and medicines, it is well to have some laws to insure purity, and to avoid fraud and deception. All such regulations fall under the police power of the state.

Regulating Nonalcoholic Drinks

A municipality may control or prohibit the sale of nonalcoholic beverages. A license may be required of all vendors to be granted on proof of the suitability of the place, the fitness of the applicant, and the payment of fees. In addition to these reg-

ulations, a state by statute, or a city by ordinance, may, within certain limits, regulate the ingredients of soft drinks. This is within the police power in the promotion and protection of public health.

Legislature may Impose Reasonable Regulations on Manufacture of Soft Drinks

Case:

Longbrake v. State of Ohio.

Supreme Court of Ohio, 1925. 112 Ohio St. 13, 146 N. E. 417,
41 A. L. R. 925.

The provisions of the statute claimed to have been violated, section 1089, General Code, are as follows: "For the purpose of this act a bottled soft drink, except pure non-alcoholic fruit juices, shall consist of a beverage made from pure cane or beet sugar syrup containing pure flavoring materials with or without added fruit acid, with or without added color, and shall contain in the finished product not less than 7 per cent sugar, provided that nothing in this act shall prohibit the use of any other harmless ingredient in the manufacture of such soft drinks, but any substitute for sugar used in such manufacture shall be equal in sweetening power to 7 per cent cane or beet sugar, and the use of saccharin is prohibited. And provided further that, whenever artificial coal-tar colors are used, nothing but the certified colors as approved by the federal government are permissible. The provisions of this section shall not apply to retailers who do not bottle soft drinks, except as to saccharin; and all bottled soft drinks not in compliance with the standards established by this act shall be deemed to be adulterated. All adulterations of any of the drinks, extracts or other articles mentioned in this act shall be unlawful."

Question: May the Legislature regulate the ingredients of soft drinks?

JONES, J. Since the Legislature may have considered that the use of saccharin as an ingredient in bottled soft drinks might be deleterious to health, or that it might be used as a substitute for sugar because of its intensive sweetening power, and since no infringement of the fundamental law appears from the face of the statute, or from facts of which this court can take judicial cognizance, we are not inclined to encroach upon the

legislative policy declared in the act prohibiting the use of saccharin in bottled soft drinks. We are of the opinion that the act is constitutionally valid and within the inherent police powers of the state.

Review of Longbrake v. State of Ohio:

1. What was the purpose of the statute?
2. What question was raised concerning the statute?
3. What did the Legislature consider in passing the statute?
4. Why was there no infringement of the fundamental law?
5. Why was the use of saccharin in bottled soft drinks prohibited?
6. When is an act unconstitutional?
7. State the rule of the case.

Readings: Regulations Concerning Soft Drinks.

1. Ordinance Regulating Sale of Lemonade. *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576.
2. Municipality may Require License for Sale of Soft Drinks. *City of Portland v. Traynor* (1919) 94 Or. 418, 183 P. 933, 186 P. 54, 6 A. L. R. 1410.

Packages and Containers

Containers for substances offered for sale have been the subject of considerable regulation. Perhaps the prevention of the use of false weights and measures has been the most outstanding necessity, and laws and ordinances in great numbers have been enacted for this purpose. Incidentally, uniformity is secured by these same measures. Some of these statutes require the true weight, or true net weight, to be stated on the package, while others make it mandatory that certain articles be sold in containers or packages which furnish a definite measure. An interesting ordinance exemplifying this is one in effect in Chicago requiring all bottles containing milk for sale to have indicated thereon their capacity. Also an ordinance which prohibited the selling or giving away of cider in smaller quantities than one gallon was held valid.

Readings: Statutes and Ordinances may Regulate Containers. City ordinance regulating sale of commodities in packages or boxes. *City of Seattle v. Goldsmith* (1913) 73 Wash. 54, 131 P. 456.

Labeling Proprietary Syrup

The plaintiff was the manufacturer of a proprietary table syrup, and had been making many sales in Kansas. By authority of the Kansas statute, the state board required the label of proprietary foods to state the percentage of each ingredient. The manufacturer claimed the right to maintain secrecy as to his compounds and processes, and contended that to be denied this right would amount to taking of property without due process of law. The case was carried to the Supreme Court of the United States, where in holding the Kansas statute valid the court declared:

"It is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be set forth. *Corn Products Refining Co. v. Eddy* (1919) 249 U. S. 427, 39 S. Ct. 325, 63 L. Ed. 689.

Ingredients—Statute may Require Disclosure of

In South Dakota a statute for the regulation of stock foods and remedies was held not to be invalid because it required the disclosure of the ingredients, and that such a requirement did not violate a constitutional right. *State v. Reininger* (1931) 59 S. D. 336, 239 N. W. 849.

Compulsory Disclosure of Materials of Ingredients of Foods

Digest of Cases:

1. Articles of Food. No man has a constitutional right to keep secret the composition of substances which he sells to the public as articles of food. *State v. Aslesen* (1892) 50 Minn. 5, 52 N. W. 220, 36 Am. St. Rep. 620.

2. Oleomargarine must be Colored. A statute prohibiting the sale of oleomargarine unless it has been colored pink is constitutional, and this is true though the statute applies to oleomargarine manufactured without the state as well as within. *State v. Myers* (1896) 42 W. Va. 822, 26 S. E. 539, 35 L. R. A. 844, 57 Am. St. Rep. 887.

CHAPTER 13

DOMESTIC AND HOUSEHOLD REMEDIES

Domestic Remedies

A considerable amount of legislation has been enacted concerning what are variously called "domestic remedies," "household remedies," and "family medicines." These terms usually refer to such substances as the ordinary unprofessional person keeps in his home for use when a physician is not consulted. It necessarily follows that the effect of these substances must be well known. Practically all of the case of *State of Kansas v. Huff* (1907) 75 Kan. 585, 90 P. 279, 12 L. R. A. (N. S.) 1094, is devoted to an attempt to define these terms. A paragraph from this case illustrates the three stages of legislation in the use of these terms: "The New York Pharmacy Act originally contained a provision permitting 'the sale of the usual domestic remedies by retail dealers in the rural districts.' Later a definition was added. 'The term usual domestic remedies here employed means medicines, a knowledge of the properties of which and dose has been acquired from common use, and includes only such remedies as may be safely employed without the advice of a physician.' Still later the proviso was so changed as to permit the sale by unlicensed persons of only certain enumerated drugs." There are at present many statutes which define the meaning of domestic remedies. The tendency in modern statutes is to enumerate the specific remedies which are to be included in the terms of domestic, household, or family remedies.

Sparsely Settled Districts

In some states merchants or dealers not pharmacists, whose places of business are situated in sparsely settled regions and at a specified distance from any drug store, are permitted, by statute, to sell designated poisons and domestic remedies. The statutes covering this subject are somewhat varied in their provisions. In some cases the merchant is limited to the sale of only such nonpoisonous prepared family medicines as are either patented or are warranted by a licensed druggist. Other states definitely list what articles may be retailed by a merchant not a phar-

macist. Such statutes do not permit a merchant to compound drugs and medicines, but merely allow him to sell certain classes of those which are already prepared.

Sale of Certain Drugs and Poisons in Rural Districts

Case:

PEOPLE v. ROEMER.

Supreme Court of New York, Appellate Division, Second Department,
1915. 168 App. Div. 377, 153 N. Y. S. 323.

Action by the people of the state of New York against John Roemer. Section 234 of the Public Health Law (Laws 1910, c. 422) allows, in places of 1,000 inhabitants or less, storekeepers to sell medicines and poisons for a period not exceeding one year upon the payment of a fee of \$3. "The storekeeper's certificate is limited to the village or place where the storekeeper resides and may be limited to the sale of certain classes of poisons sold only in original packages and put up by a licensed pharmacist whose name and business address is displayed on the package."

Question: Whether, in districts with small populations, distant three miles from a pharmacy or drug store, the state may license a layman to sell drugs under certain restrictions and elsewhere require the vendor to be of prescribed knowledge and skill.

PER CURIAM. The storekeeper is not authorized to compound medicines, and, like pharmacists, he "is responsible for the strength, quality and purity of all drugs sold or dispensed by him, subject to the guaranty provisions of this article," and is subject to section 237 of the law, which relates to "adulterating, misbranding and substituting." The function permitted the storekeeper is comparatively much inferior to the powers of a pharmacist or druggist, while the responsibilities imposed upon him are substantially the same. But under the same conditions each has the same privileges. The question is whether for the sale of poisons and medicines, which must necessarily mean prepared medicines (that is, such as do not require compounding by the vendor), the state must compel dwellers in sparsely settled districts to resort to a pharmacy or drug store, however distant, for articles that may be needed for poisons or medicines. That would mean that a farmer must go beyond his locality to purchase poisons used in his business, if a pharmacist has not settled

within convenient reach, and that medicines prepared or sold in packages, however pressing the exigency, must under the same conditions be sought beyond the locality. That would be a denial of the convenient purchase of necessities and permit pharmacists, who shun scattering communities, to monopolize a trade at centers to which their traffic would not tend. Because a pharmacist must study and acquire knowledge to be such, it does not follow that some of his inferior powers may not be committed to less trained men who reside where persons of his class do not carry on business.

Review of People v. Roemer:

1. The statute gave what rights to storekeepers?
2. What question was involved?
3. What were the liabilities of the storekeeper under the statute?
4. What hardships would be imposed if the case had been decided otherwise?
5. Formulate the holding of the case.

Dealers may Sell Drugs in Small Villages

Digest of Case:

The Tennessee statute regulating the practice of pharmacy and sale of poisons, making it unlawful for any person except a registered pharmacist to conduct a pharmacy except that drug dealers may sell drugs or medicinal preparations in rural districts of population of less than 500 inhabitants, held not unconstitutional as making that criminal in cities which is innocent and unpenalized in small villages. *State v. Foutch* (1927) 155 Tenn. 476, 295 S. W. 469, 54 A. L. R. 725.

Comprehensive California Statute in Relation to Dealers in Rural Districts

The California statute is inserted because of the lucidity with which it sets forth a large variety of provisions, many of which are not included in the statutes of other states.

Permit to Dealers in Rural Districts

Statute: The Board of Pharmacy shall issue a permit to general dealers in rural districts in which the conditions, in their

judgment, do not justify the employment of a registered pharmacist, and where the store of such general dealer is not less than three miles distant from the store of a registered pharmacist; which said permit shall authorize the persons or firm named therein to sell in such locality, but not elsewhere, and under such regulations and restrictions as said board may from time to time adopt, the following simple household remedies and drugs, in such manner and form as may be hereafter authorized by said board, as follows, to-wit:

Tincture of arnica, spirits of camphor, almond oil, distilled extract of witch hazel, syrup of ipecac, syrup of rhubarb, hive syrup, sweet spirits of nitre, tincture of iron, epsom salts, rochelle salts, senna leaves, carbonate of magnesia, seidlitz' powders, quinine, cathartic pills, chamomile flowers, caraway seeds, chlorate of potash, moth balls, plasters, salves, ointments, peroxide of hydrogen, gum camphor, blue ointment, asafoetida, saffron, anise seed, and saltpeter, and such other remedies or drugs as the board may from time to time designate.

The board shall charge an annual fee of five dollars in advance for such permit, and it shall be unlawful for any dealer to sell any drugs or household remedies without complying with the requirements of this section. Whenever a registered pharmacist shall establish a pharmacy within three miles by the shortest road from the place of business of such a dealer, no further license shall be granted, and the license already issued shall be void; provided that the following drugs, medicines, and chemicals may be sold by grocers and dealers generally without restrictions, viz.: Glauber salts, vaseline, turpentine, condition powders, cream of tartar, carbonate of soda, bay rum, essence of peppermint, ammonia, alum, castor oil, bicarbonate of soda, chloride of lime, glycerine, witch hazel, sheep dip, borax, sulphur, bluestone, copperas, flax seed, insect powder, fly-paper, poultry vermifuge, and all economic poisons as that term is defined in "The California Economic Act of 1921" or any act amendatory thereof, and licensed and registered under and sold in original sealed packages and labeled with the official poison labels except the following: Arsenate of lead, arsenate of calcium, Paris green, London purple, and hydrocyanic acid in original sealed packages of less than one pound and labeled with the official poison labels, any economic poison containing more than two per cent strychnine or ten per cent elemental phosphorus, and poisons containing more than two-tenths of one per cent by weight of arsenic expressed in terms of metallic arsenic, corrosive sublimate, and

cyanide of potassium; provided, that this act shall not prevent the sale of epsom salts in original packages of not less than ten pounds when plainly and properly labeled "for live stock only and not for medicinal purposes," in letters not less than half an inch in height. Cal. St. 1929, p. 239, § 16.

Readings: Sale of Drugs in Rural Districts.

1. Shopkeeper may Sell Certain Medicines and Poisons. *State v. Donaldson* (1889) 41 Minn. 74, 42 N. W. 781.
2. Merchants in Villages may Sell Certain Drugs. *State Board of Pharmacy v. Matthews*, 197 N. Y. 353, 90 N. E. 966, 26 L. R. A. (N. S.) 1013.
3. State may Regulate Sale of Domestic Remedies in Original Packages. *Ex parte Gray* (1929) 206 Cal. 497, 274 P. 974.

Restricting Sale of Domestic Remedies—Statute Unconstitutional

A recent statute in Nebraska provided that only licensed pharmacists could sell the articles listed in the United States Pharmacopœia or National Formulary. Under this statute, one Henry Geest was charged with practicing pharmacy without a license. The defendant was operating a retail grocery and displayed for sale acetyl salicylic acid, commonly called aspirin, being one of the articles listed in the United States Pharmacopœia and the National Formulary. Within the terms of the statute the defendant was practicing pharmacy without a license. The court held the statute invalid, in that it transcends the police power of the state. "The United States Pharmacopœia is a book containing a very extensive list of drugs and remedies. * * * Among the items listed in the Pharmacopœia are many articles of general household use, which are, in themselves, harmless but useful, such as salt, soda, soap, mutton suet, rose water, glycerine, distilled water, olive oil, honey, syrup, and many other articles, all of which, under the statute, are defined as drugs and may be sold only by licensed pharmacists. * * * It is apparent that it does not tend to promote public safety or welfare to limit to registered pharmacists the sale of such articles as salt, soda, soap, distilled water, corn starch, lard, and many other useful and harmless articles that may as well be dispensed by a grocer as by a pharmacist. We do not wish to be understood as holding that aspirin is a harmless drug, or that its sale should

not be limited to registered pharmacists, but we are confronted with the proposition that the act limits the sale of all drugs and medicines, not only those which are poisonous, harmful, or deleterious, but, as well, those which are useful but harmless.

* * * We are constrained to hold that, insofar as the act limits to licensed pharmacists the sale of all articles listed in the United States Pharmacopœia or National Formulary, it transcends the police power and is therefore invalid." *State v. Geest* (1929) 118 Neb. 562, 225 N. W. 709.

Domestic Remedies Not Included in the Terms of the Statute

Case:

PEOPLE v. FISHER.

Appellate Court of Illinois, 1898. 83 Ill. App. 114.

This was a prosecution against one Fisher to recover by an action of debt the penalty provided by law for selling drugs in violation of an act to regulate the practice of pharmacy in the state of Illinois. The complaint charged Fisher with selling one dime's worth of tincture of iodine and one dime's worth of quinine without being a registered pharmacist, as required by the act. Judgment for the defendant, and appeal by the people.

HARKER, J. The court instructed the jury as follows:

"Although the jury may believe from the evidence that the defendant sold iodine and quinine, yet if they further believe from the evidence that they are domestic remedies, then the defendant is not liable for such sales."

The sale of "domestic remedies" is excepted from the statutory provisions under which Fisher was being prosecuted. It is objected to this instruction that there is no evidence on which to base it; the only evidence in the record being that iodine is an irritant poison, and that quinine is a drug prepared by manufacturing chemists.

We cannot agree with counsel for the plaintiffs in error that domestic remedies, within the meaning of the statute, are confined to "harmless concoctions of teas and herbs," which those unlearned in medical and scientific lore can prepare at home and do not include drugs requiring scientific knowledge and apparatus to prepare. We think a drug, although prepared by skilled chemists and scientific apparatus, may come into such common use and be so well understood in its effects by people without medical knowledge as to make it a domestic remedy.

For instance, there are portions of territory lying within what is known as the Mississippi Valley where chills and fever are of such frequent occurrence (and recurrence) that quinine, in certain seasons of the year, is almost as common an article of household use as the ordinary necessities of life, and the good housewife, when she doses the children from the family bottle understands its effect about as well as a licensed pharmacist. It is a matter of common experience that iodine is frequently used in the household as an antidote for wild-ivy poison, ringworm, and other skin affections. The mere fact that it is an irritant poison would not bring it out of the pale of domestic remedies.

We see no error in the record that would justify us in reversing the judgment. Judgment affirmed.

Review of People v. Fisher:

1. Why was this an action of debt?
2. How was it to be determined whether these drugs were domestic remedies or not?
3. What is a domestic remedy according to this case?
4. Does the common use of a drug help to determine whether it is a domestic remedy or not?
5. What illustrations are used in relation to quinine and iodine?

Readings: Law of Domestic Remedies.

1. Legislature may Restrict Sale of Domestic Remedies to Licensed Pharmacists. *State Board of Pharmacy v. Matthews* (1910) 197 N. Y. 353, 90 N. E. 966, 26 L. R. A. (N. S.) 1013.
2. Hydrogen Peroxide is Not Generally and Popularly Known as a Medicine. *State v. Hanchette* (1913) 88 Kan. 864, 129 P. 1184.
3. Family Medicines Held to Include Camphor, Quinine, Paregoric, Spirits of Turpentine, Castor Oil, Saltpeter, Epsom Salts. *Lewis v. Brannen* (1909) 6 Ga. App. 419, 65 S. E. 189.
4. Administering Domestic Remedy for Compensation as Practicing Medicine. *State of Kansas v. Huff* (1907) 75 Kan. 585, 90 P. 279, 12 L. R. A. (N. S.) 1094.

Kentucky Law on Sale of Domestic Remedies

Statute: Nothing in this act shall be construed so as to apply to, or in any manner interfere with, the sale of the usual non-poisonous domestic remedies, and patent or proprietary medicine, by county stores in small places or rural districts. Nothing in this act shall apply to, or in any manner interfere with, the business of any licensed practicing physician, or prevent him from supplying to his patients such articles as may seem to him proper, or with his compounding his own prescriptions. St. 1922, § 2632.

Regulation of Domestic Remedies and Sales in Original Packages

Digest of Cases:

1. Statute requiring sales of original package medicines other than patent medicines to be made under the supervision of registered pharmacists held not unconstitutional, even though by statute the board of pharmacy was authorized in its discretion to issue permits to general dealers in rural districts, where the store of such general dealer is not less than three miles from store of registered pharmacist, to sell certain simple household drugs. In re Gray (1929) 206 Cal. 497, 274 P. 974.

2. A statute limiting the sale of domestic remedies and harmless medical preparations to licensed pharmacists is a valid exercise of the police power of the state, and is not void because it permits the sale of certain remedies by merchants in their place of business in villages. State Board of Pharmacy v. Matthews (1910) 197 N. Y. 353, 90 N. E. 966, 26 L. R. A. (N. S.) 1013.

Household Remedies Regulated by Statute

Section 5814, Minn. Gen. St. 1923, provides: "No person, not a registered pharmacist or a dealer employing and keeping such a pharmacist in active charge of his place of business shall retail, compound or dispense drugs, medicines or poisons, or keep or conduct a place for retailing, compounding or dispensing drugs, medicines, or poisons." The defendant sold milk of magnesia at a general store. It was held that the milk of magnesia was not a proprietary medicine, and, though a harmless household remedy, yet it came within the pharmacy law restricting the

sale of drugs, medicines, and poisons. In the opinion, the court named the states which have held similar statutes valid or invalid. *State v. F. W. Woolworth Co.*, 184 Minn. 51, 237 N. W. 817, 76 A. L. R. 1202.

Essence of Peppermint and Sweet Spirits of Niter

Digest of Case:

Essence of peppermint and sweet spirits of niter are "medicines" within the law regulating the sale thereof. *Board of Pharmacy of State of New Jersey v. Hutchin* (1932) 109 N. J. Law, 641, 160 A. 214.

Readings: Statutes Regulating Sale of Harmless Household Remedies.

1. Sale of Paregoric and Quinine Pills in Original Packages by One Not a Druggist, Violated Statute. *People v. Abraham* (1897) 16 App. Div. 58, 44 N. Y. S. 1077.
2. Statute may Regulate Sale of Useful Household Remedy Such as Iodine. *State v. Foutch*, 155 Tenn. 476, 295 S. W. 469, 54 A. L. R. 725.
3. Statute Regulating Sale of Drugs, Medicines, or Poisons in Original Packages of Manufacturer Held Unconstitutional. *State v. Childs* (1927) 32 Ariz. 222, 257 P. 366, 54 A. L. R. 736.
4. Sale of Drugs by a Person Not a Licensed Pharmacist. 15 Iowa Law Rev. 369-371.
5. Prohibiting Sale of Proprietary and Domestic Remedies. *Noel v. People*, 187 Ill. 587, 58 N. E. 616, 52 L. R. A. 287, 79 Am. St. Rep. 238.

CHAPTER 14**DISTRIBUTION OF FREE SAMPLES OF DRUGS****Distribution of Free Samples**

The relatively small number of cases recorded concerning the distribution of free samples of medicines, drugs, and the like does not necessarily mean that there has been but little litigation. Regulation of the distribution of free samples is controlled largely by state statutes and by city ordinances. Many cases of their violation are tried in police and city courts and are not appealed to the higher courts. Hence no accounts of them appear in the records. In one of the recorded cases, *Ayres v. State*, 178 Ind. 453, 99 N. E. 730, Ann. Cas. 1915C, 549, the court gives the purpose of statutes prohibiting the distribution of free samples: "We can understand, also, that the taking of samples of medicine by adults, who do not understand the effect of certain medicines on the human system, or on different individuals afflicted with specific troubles, or the taking of medicine at all, without its being prescribed by a qualified person, may be very harmful, and we think we discover a purpose in the legislation to prevent in some degree the promiscuous absorption of medicine, without regard to its possible effects, by those afflicted, or who deem themselves afflicted in a specific way, and who have the disposition to take anything which promises relief, or is recommended."

Classification of Statutes

Approximately half of the states have statutes forbidding the distribution of free samples. It is interesting to note the similarities and differences in these statutes. All designate (a) what may not be distributed; (b) who may not distribute them; (c) the places where such articles may not be placed; and (d) the manner of their distribution. In one or more of the state statutes all of the following are found:

- (a) Sample of drug, medicine, pill, powder, tablet, salve, liniment, cosmetic, disinfectant, antiseptic, candy, ink, coloring or polishing compound, or any substance injurious to health, or any bottle, box, envelope, or package containing the same.
- (b) Any person, servant, or agent, corporation, association, firm, or company.

(c) About any building, house, place of residence, lawn, inclosure, porch, portico, doorstep, letter box, street, or highway.

(d) Distribute, deposit, place, leave, cast, scatter, throw, or give away.

Always some penalty or punishment is provided for the violation of these statutes. The distribution of free samples is made a misdemeanor, and the penalty varies from \$25 for each offense to \$300 and imprisonment for one year in the state penitentiary.

In some states the prohibition on distributing free samples is limited to children under 16 years of age, while in others it is a misdemeanor regardless of whether the recipient be a child or an adult.

Ohio Law Prohibiting Distribution of Samples Containing Drug or Poison

Statute: Whoever leaves, throws, or deposits upon the doorstep or premises owned or occupied by another, or hands, gives or delivers or causes the same to be done to any person, except in a place where it is kept for sale, a patent or proprietary medicine, preparation, pill, tablet, powder, cosmetic, disinfectant, or antiseptic, or a drug or medicine that contains poison or any ingredient that is deleterious to health, as a sample, or for the purpose of advertising, shall be fined not less than twenty-five dollars nor more than one hundred dollars or imprisoned not less than thirty days, nor more than one hundred days, or both. Ohio, Gen. Code 1926, § 12664.

Distributing Samples of Medicines to a Child

Case:

STATE v. CRAY.

Supreme Court of Vermont, 1911. 85 Vt. 90, 81 A. 450, 36 L. R. A. (N. S.) 630.

Cray was convicted of distributing free samples of medicine known as "De Witt Kidney and Bladder Pills," by handing the same to Rosie Parrotti, a child of the age of 4 years, in violation of a statute forbidding the distribution of free or trial samples of a medicine, drug, chemical, or chemical compound, by leaving the same exposed upon the ground, sidewalk, porch, doorway, letter box, or in any manner that children may become possessed of the same.

The accused had a boy helping him, and gave the instructions not to violate the statute, but in disregard of such instructions the free sample was handed to the child.

Question: Though the servant acted in violation of his master's instruction, yet is the master liable to the penalties imposed by the statute?

WATSON, J. Under these authorities the question of intention is immaterial. The statute looks at and punishes the act constituting the offense, without regard to the intention of the person by or for whom the distribution was made. A person may lawfully distribute such articles as are named in the statute, if he observes its provisions. If he employs an agent for that purpose, it is his duty to know that the law regulating the manner of distribution be not violated, and in case of its violation by such agent in the performance of the duties of his agency the principal is not absolved from responsibility by showing that in the manner of the work the violative acts were contrary to his previous general instructions. It follows that, notwithstanding the distribution alleged was in fact by the respondent's agent, and contrary to his general instruction against delivering to children, yet, as it was done by the agent in distributing samples furnished him by the respondent for that purpose, acting under the respondent's orders, and in the prosecution of the respondent's business, for which he was employed, the distribution was caused by the respondent, within the meaning of the statute, and he is answerable therefor.

Review of State v. Cray:

1. Why was this a criminal case?
2. What provision of the statute was violated?
3. Why should the master be held liable when he had given the servant instructions not to violate the statute?
4. Why was intention immaterial in this case?
5. Was the agent acting in the performance of his duties when he violated the statute?
6. Could the agent also have been held liable in this case?
7. What protection is sought to be afforded by statutes of this kind?

Readings: Distribution of Free Samples of Medicine Prohibited. Unlawful to distribute from house to house. *Ayres v. State* (1912) 178 Ind. 453, 99 N. E. 730, Ann. Cas. 1915C, 549.

CHAPTER 15

ITINERANT VENDORS OF DRUGS

Itinerant Vendors—Regulation of

From very early times it has been considered within the province of legislatures to regulate hawkers, transient or itinerant vendors, and peddlers. This is usually done by requiring a license, which will be granted only upon compliance with certain stipulated provisions. Some legislatures by statute prohibit entirely the business of hawking and peddling, while others forbid it in particular localities. These statutes must be in accordance with the provisions of Federal and State Constitutions as to class legislation, equal protection of the law, and due process of law.

A municipal corporation, by virtue of a state statute, or its charter, may regulate to protect the health, comfort, and quiet of the municipality. The power to license implies the power to provide the amount of the license. Vendors of patent medicines and drugs may be regulated by both state and municipality.

Chief Justice Fuller, in *Re Rahrer*, 140 U. S. 545, 11 S. Ct. 865, 35 L. Ed. 572, said: "The power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order, and prosperity, is a power originally and always belonging to the State, not surrendered by them to the general government, nor directly restrained by the Constitution of the United States, and essentially exclusive. And this court has uniformly recognized state legislation, legitimately for police purposes, as not, in the sense of the Constitution, necessarily infringing upon any right which has been confided expressly, or by implication, to the national government."

Statutes providing for the license of itinerant vendors or peddlers of drugs are not for the purpose of creating revenue for the state, but to protect the public from deception, fraud, and quackery, and to promote the general welfare of society.

Physician as Itinerant Vendor

A person who is a physician, and as such has a license to practice medicine, may not become an itinerant vendor of drugs,

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medicines, or nostrums, without complying with the statutes controlling such occupation. He, like any other, is subject to the license and occupation tax imposed on the business.

Requiring License of Itinerant Vendors of Drugs does Not Interfere with Interstate Commerce

An Iowa statute imposed a license fee of \$100 per annum on itinerant vendors of drugs, nostrums, ointments, or appliances of any kind intended for the treatment of diseases or injuries. The defendant was engaged in the business of selling on commission proprietary medicines manufactured in the state of Minnesota. All medicines were sold in the original packages in which they were placed by the manufacturer. In addition, defendant distributed printed circulars representing the medicines to be a cure for certain diseases. The defendant was convicted of violating the statute because he did not secure a license. The defendant claimed the statute was invalid as a regulation of interstate commerce. "But it was held that state laws which do not discriminate between residents and products of a state and those of another state; which are not designed to interfere in any manner with interstate commerce, as those which are in the nature of a simple tax upon sales of merchandise, imposed alike upon all persons, whether residents or non-residents of the state, * * * are not repugnant to the constitutional provisions in question." *State v. Wheelock* (1895) 95 Iowa, 577, 64 N. W. 620, 30 L. R. A. 429, 58 Am. St. Rep. 442.

Sales by Itinerant Vendors of Drugs Prohibited by State Statutes

Case:

BACCUS v. STATE OF LOUISIANA.

Supreme Court of the United States, 1913. 232 U. S. 334, 34 S. Ct. 439, 58 L. Ed. 627.

An itinerant vendor was convicted of selling drugs or medical compounds. The information upon which the conviction was based charged that the accused had, in violation of section 12 of act 49 of the Laws of Louisiana for 1894, illegally, as an itinerant vendor or peddler, "sold drugs, ointments, nostrums, and applications intended for the treatment of diseases and deformity."

Question: Did the state have authority to prohibit such sales entirely?

Mr. Chief Justice WHITE. The single issue to be decided is, Did the state have power, without violating the equal protection or due process of law clause of the 14th Amendment, to forbid the sale by itinerant vendors of "any drug, nostrum, ointment, or application of any kind, intended for the treatment of disease or injury" although allowing the sale of such articles by other persons? That it did have such authority is so clearly the result of a previous ruling of this court (*Emert v. Missouri*, 156 U. S. 296, 15 S. Ct. 367, 39 L. Ed. 430), or, at all events, is so persuasively made manifest by the authorities cited, and the reasoning which sustained the ruling of the court in the case just stated, as to leave no room for controversy on the subject. Judgment affirmed.

Review of Baccus v. State of Louisiana:

1. For what conduct was the defendant convicted in the lower court?
2. On what specific charge was the information based?
3. Why is nothing said in the case about a license?
4. What question was involved?
5. Did Chief Justice White state any reasons for his opinion?
6. What amendment of the United States Constitution was involved?
7. Is there a good reason for prohibiting all sales of drugs or medicines by itinerant vendors?

That Defendant Was an Itinerant Vendor of Drugs

Case:

SNYDER v. CLOSSON.

Supreme Court of Iowa, 1891. 84 Iowa, 184, 50 N. W. 678.

Action upon a promissory note. The defendant is a manufacturer of proprietary medicines, having his permanent manufactory and residence in Independence, Iowa, and from which he supplies drug stores and other stores throughout the state, and also supplies such as call for his remedies, both wholesale and retail. During the fall of 1889, and up to September 20th of that year, the defendant attended county fairs in different parts of

the state, and at such places, for the purpose of advertising and introducing his medicines, caused a booth to be erected, and had a band of music and singers, and made speeches to the people, setting forth what he claimed his medicines would cure, and sold said medicines to all persons he could induce to purchase the same. Among said medicines was a pain relief, a dyspepsia cure, and a liniment for animals, whose curative properties he stated. The defendant claimed his said remedies would cure diseases and injuries to man and beast.

The plaintiff claimed that such acts constituted the defendant an itinerant vendor of drugs and nostrums and a traveling doctor, and threatened to cause the defendant to be arrested. For the purpose of avoiding such arrest the defendant gave the note in controversy in payment of the license fee.

Iowa statute (Miller's Code, p. 953, § 10): "Any itinerant vendor of any drug, nostrum, ointment, or appliance of any kind, intended for the treatment of diseases or injury, who shall by writing or printing or any other method publicly profess to cure or treat diseases or injury or deformity by any drug, nostrum, or manipulation, or other expedient, shall pay a license of one hundred dollars per annum."

Question: Under the facts given, was the defendant an itinerant vendor of drugs, and so subject to the license fee?

BECK, C. J. He clearly was an itinerant vendor of the nostrums, patented or proprietary medicines, which he advertised, for, according to the findings of the court, he traveled to the fairs in different parts of the state and sold his nostrums to all persons he could induce to purchase. To constitute an itinerant vendor it is not necessary that the person should travel all the time, and have no fixed place of sale. He may have a place of business where he sells his goods during a part of the time, and he may travel for the sale of his medicines at other times. It cannot be said that one who has a drug store in one town of the state, which he superintends and personally manages a part of the time, may the other parts of the year travel through the state to the county fairs, and put out his nostrums by the acts disclosed in the finding of fact. * * * The finding of facts showed that defendant did publicly recommend his nostrums as a remedy for diseases. He thus, in the language of the statute cited, did, "publicly profess to * * * cure disease" by the nostrums sold. The defendant was subject to the statute.

Review of Snyder v. Closson:

1. Why was the action on a promissory note?
2. Give the essential facts.
3. Give the substance of the Iowa statute.
4. What was the question involved?
5. State the proposition of law.

Itinerant Vendors of Drugs*Digest of Cases:*

1. Not Engaged in Interstate Commerce. A resident agent who receives goods in bulk, unpacks them at his home, and retails them from house to house, making his profits from commissions, is not engaged in interstate commerce but in the occupation of peddling within the state. He must pay the license tax upon traveling persons pursuing the occupation of selling patent and other medicines. *Shed v. State* (1913) 70 Tex. Cr. R. 10, 155 S. W. 524.

2. Advertising does Not Constitute Vending. After the expiration of his itinerant vendor's license, the defendant continued to sell medicines from his home, his store, and one other place, and although, while traveling in a wagon and selling other articles, he advertised his medicines, this did not make him guilty of selling medicines as a traveling person without a license. *People v. State* (1912) 68 Tex. Cr. R. 631, 152 S. W. 168.

3. Perfumery Sold by Canvassing Crew. A foreign corporation shipped perfumery from Illinois to Michigan, where members of a canvassing crew carried it from house to house to be purchased or sold by the householder or his children and later accounted for to another agent of the corporation. It was held that the transaction did not constitute interstate commerce so as to be beyond the authority of the city to regulate by ordinance. *City of Muskegon v. Hanes* (1907) 149 Mich. 460, 112 N. W. 1077.

4. Annual License Fee. A statute requiring itinerant vendors of drugs to obtain an annual license and pay a \$100 fee was held not to contravene the interstate commerce clause. *State v. Logsdon* (1933) 215 Iowa, 1297, 248 N. W. 4.

5. Police Power as Applied to Itinerant Vendors. Peddlers, hawkers, itinerant merchants, and transient vendors of merchandise are subject to police power, which may prohibit their

activities under penalty. *Town of Green River v. Fuller Brush Co.* (C. C. A.) 65 F.(2d) 112, 88 A. L. R. 177.

6. **Licensed Physician Not Authorized Vendor.** The fact that a duly authorized physician has the right to practice medicine anywhere in the state does not authorize him to become an itinerant vendor of his medicines without paying the license therefor. *State v. Gouss* (1892) 85 Iowa, 21, 51 N. W. 1147.

Itinerant Vendor Act of California

Statute: Section 1. No person, as principal or agent, shall conduct as an itinerant vendor the business of selling or in any manner disposing of drugs, nostrums, ointments or any appliances for the treatment of disease, deformities or injuries, within this State, without previously obtaining a license therefor as herein provided. Cal. Gen. Laws 1931, Act 4332, § 1.

Readings: The Law Concerning Itinerant Vendors of Drugs:

1. City Ordinance may Regulate Itinerant Physicians. *City of Fairfield v. Shallenberger* (1907) 135 Iowa, 615, 113 N. W. 459.
2. What Acts Violate the Statute? *State v. Wheelock* (1895) 95 Iowa, 577, 64 N. W. 620, 30 L. R. A. 429, 58 Am. St. Rep. 442.
3. License Fee of \$100 for Each Half Year is Valid. *Matter of Gilstrap* (1915) 171 Cal. 108, 152 P. 42, Ann. Cas. 1917A, 1086.
4. Oregon Statute is Constitutional. *State v. McFall* (1924) 112 Or. 183, 229 P. 79.

CHAPTER 16

INTENTIONAL MISUSE OF DRUGS AND OTHER INSTRUMENTALITIES

Abortion—Prescribing or Administering Drugs

In practically every state there is a statute which makes it a criminal offence to prescribe or administer drugs or medicines with the intent to procure an abortion or to prevent conception.

Ohio statute: "Whoever sells, gives away or keeps for sale or gratuitous distribution, a secret drug or nostrum purporting to be exclusively for the use of females or for preventing conception or procuring abortion or miscarriage, shall be fined not more than one thousand dollars or imprisoned not more than six months or both." Gen. Code 1925, § 13033.

Abortion Statutes are Severe

The state is directly interested in the life and health of all of its citizens, and as any attempt at abortion may prove dangerous to the life and health of the prospective mother and to the existence of the child, it is pretty generally provided by statute that it is a crime to experiment in any way with drugs, medicines, or noxious instruments to accomplish such a result.

Liability of Druggist

The druggist violating any of these statutes incurs a great liability, and the law makes it easy to prosecute the offender. Usually the indictment need not specify the name, quality, or quantity of drug used or prescribed, nor specify that the drug was noxious, a liquid, a solid, or gaseous. It makes no difference under most of the statutes that the attempt failed to accomplish the desired end. The ignorance of the informer or operator may cause great damage to the health of the mother or child, or both. In one instance an abortion was attempted by using tobacco juice in a syringe, and, though the object was not accomplished, yet the offender was held criminally liable for an attempt to commit the offense. In a few cases it has been held that, if a druggist knows that the purpose for which medicine is prescribed by a

doctor is to violate any of this class of statutes and with this knowledge furnishes the drug, he also becomes criminally liable.

Advertising Drugs for Females

The California statute provides: "Every person who wilfully writes, composes or publishes any notice or advertisement of any medicine or means of procuring or facilitating a miscarriage or abortion or for the prevention of conception or who offers his services by any notice, advertisement or otherwise, to assist in the accomplishment of any such purpose is guilty of a felony." Cal. Pen. Code 1923, § 317.

In practically every state there is a statute similar to the California statute here given. These statutes are so plain that any comment or attempt to add additional explanation seems unnecessary. It only remains for the practitioner to inform himself as to the provisions of his state statute.

Advertising Drugs for Females in Indiana

Statute: Whoever prints or publishes an advertisement of any secret drug or nostrum purporting to be for the exclusive use of females, or which cautions females against their use when in condition of pregnancy, or publishes any account or description of any drug, medicine, instrument or apparatus for preventing conception, or for procuring abortion or miscarriage, or sells or gives away, or keeps for sale or gratuitous distribution, any newspaper, circular, pamphlet or book containing such advertisement, account or description, or any secret drug or nostrum purporting to be exclusively for the use of females, or for preventing conception or procuring abortion or miscarriage, shall be fined not less than five dollars nor more than five hundred dollars, to which may be added imprisonment in the county jail not less than ten days nor more than six months. Burns' Ann. St. 1926, § 2572.

Liability in Damages

For the violation of these statutes, the offender is usually prosecuted criminally, but in some instances there is also a liability to pay damages. An abortion is considered both illegal and immoral, and the woman who secures or voluntarily consents to the performance of such an operation upon herself probably cannot

recover for the negligent manner in which it is performed. However, if fraud or deceit has been practiced upon her, a cause of action may arise in her favor. There could be cases also in which parents might recover for an injury to a minor daughter, or a husband for injury to his wife, if he were in no way responsible for the wrongful act.

Abortifacients and Contraceptives Advertised Unlawfully

Digest of Case:

The distribution of a pamphlet giving hint or information as to persons from whom, or places at which, articles to prevent conception might be procured was an offense, though no specific person or place named. *Commonwealth v. Allison* (1917) 227 Mass. 57, 116 N. E. 265.

Abortifacients and Contraceptives

Statute: A person who sells, lends, gives away, or in any manner exhibits, or offers to sell, lend, or give away, or has in his possession with intent to sell, lend, or give away, or advertises or offers for sale, loan, or distribution any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion; or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such article or medicine can be purchased or obtained, or who manufactures any such article or medicine, is guilty of a misdemeanor, and, on conviction, shall be punished by a fine not less than twenty-five dollars nor more than two hundred dollars, and by imprisonment in the county jail not exceeding three months. *Miss. Ann. Code* 1917, § 1026.

Readings: The Law of Abortion.

1. For Abortion on Wife, Husband may Recover. *Lembo v. Donnell* (1917) 116 Me. 505, 101 A. 469.
2. Damages for Death of Voluntary Victim. *Szadiwicz v. Cantor* (1926) 257 Mass. 518, 154 N. E. 251, 49 A. L. R. 958.
3. Giving Drugs to Nonpregnant Woman with Intent to Commit an Abortion. 26 *Columbia Law Rev.* 1027, 1028.

4. Mailing Pamphlets on Sex Instruction. *U. S. v. Dennett* (C. C. A.) 39 F.(2d) 564, 76 A. L. R. 1092.

Information to Procure Abortion or to Prevent Conception Excluded from Mails

The United States statute (18 USCA § 334) makes it an offense to mail a written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means, articles or things for abortion may be obtained or made, or how or by what means conception may be prevented. The object of the statute is to prevent the use of the mails to circulate or deliver matter to corrupt morals. The provisions of this statute are violated as soon as the objectionable matter is mailed, and it is not necessary that the entire contents of a communication be objectionable in character, or that the mail be delivered to the addressee.

Readings: Misuse of Mails—Abortion—Contraceptives.

1. Information Sent in Response to Decoy Letter. *Ackley v. United States*, 200 F. 217, 118 C. C. A. 403.
2. Mailing Information Where Abortion will be Performed. *Bours v. United States* (1915) 229 F. 960, 144 C. C. A. 242.
3. That Defendant did Not Believe or Know It to be Unmailable is Immaterial. *Magon v. United States* (1918) 248 F. 201, 160 C. C. A. 279.
4. That Motive of Defendant was Good is No Defense. *Knowles v. United States* (1909) 170 F. 409, 95 C. C. A. 579.
5. Mailing Obscene Matter. 18 USCA § 334, and cases digested therewith.

Assault and Battery

Assault and battery is the use of any unlawful violence upon the person of another with the intent to injure him, whatever the object, means, or degree of violence used. 1 Words and Phrases, First Series, 539. An assault is an attempt to do some violence to the person of another, and a battery includes an assault, but not every assault results in a battery. Some liabilities incurred by druggists have been classified under the division of

law designated as assault and battery. It has been held to amount to an assault and battery to pour or throw a drug or chemical on the person of another, or even to administer a drug for an unlawful purpose. In one case it was held to be a criminal assault to pour turpentine on the body of a female with the intent to accomplish a permanent injury.

Assault and Battery by Use of Drugs

There have been numerous instances in which druggists have committed assault and battery by the unlawful administering or sale of drugs and poisons. In some cases the victim took the drug voluntarily, under the belief that it was some other substance. In other instances the drug has been placed in some article of food or drink, usually to play some trick or joke. It has been held in a large number of cases that a druggist who sells a drug or poison for a harmful or unlawful purpose, or who mixes it with food or candy, knowing that it is going to be used for an unlawful purpose and not for the purpose of medicine, is himself guilty of an assault and battery, where the drug was actually used for the unlawful purpose in pursuance of the intent at the time of purchase, and it was administered to some human being.

An Assault and Battery by Putting Drug on Candy

Case:

STATE v. MONROE.

Supreme Court of North Carolina, 1897. 121 N. C. 677, 28 S. E. 547, 43 L. R. A. 861, 61 Am. St. Rep. 686.

J. P. Monroe was indicted and convicted for assault and battery, and he appeals.

Question: If a druggist, at the request of a customer, puts croton oil on candy, knowing that it is to be used to play a trick, and it is given and causes injury, is the druggist guilty of an assault and battery?

FAIRCLOTH, C. J. Will Horn administered to Ernest Barrett a dose of croton oil, and the oil had an injurious effect on Barrett. Defendant admits he sold the oil to Horn, and at his request dropped it into a piece of candy, but says he did not know that these parties were playing practical jokes on each

other, and did not know for what purpose Horn wanted the oil. Another witness testified that defendant said that Horn said he wanted the oil "for a fellow." Defendant denied saying this. Another witness testified to the quinine episode, and to Barrett's and Horn's tricks with each other. Defendant testified that he knew that a day or two before Horn had given Barrett a dose of quinine as a joke, in lemonade. There were other witnesses on these matters. Defendant is indicted for an assault on Barrett. If guilty, he must be so as a principal, not as an accessory. His guilt, then, depends upon whether he knew, or had reason to believe, that the dose was intended for Barrett or some other person as a trick, and not for medicinal purposes. The whole evidence was submitted to the jury, who rendered a verdict of guilty. His honor instructed the jury that when the defendant sold the oil, if he "knew or had every reason to believe, and did believe, that it was intended for Barrett or some other person by way of a trick or joke, and not for a medicinal purpose, the defendant would be guilty of assault and battery." He also charged that it was not necessary that it should be a poisonous or deadly dose; that it was sufficient if it was an unusual dose, likely to produce serious injury. To this instruction we see no objection, and we think it covers the substance of the defendant's prayers proper to go to the jury. There was no exception to the evidence.

Affirmed.

Review of State v. Monroe:

1. Was this a criminal case?
2. State the question of the case.
3. What two instructions were given by the judge?
4. Define assault and battery.
5. Why was the druggist guilty when he did the act at the request of a friend?

Readings: Assault and Battery by Illegal Use of Drugs.

1. Throwing Vitriol. *People v. Stanton* (1895) 106 Cal. 139, 39 P. 525.
2. Throwing Corrosive Acids. *State v. District Court of Third Judicial District* (1907) 35 Mont. 321, 89 P. 63.
3. Pepper. *Murdock v. State* (1880) 65 Ala. 520.
4. Love Powders. *Commonwealth v. Stratton* (1873) 114 Mass. 303, 19 Am. Rep. 350.

5. Cròton Oil. McKibbin v. F. E. Bax & Co. (1907) 79 Neb. 577, 113 N. W. 158, 13 L. R. A. (N. S.) 646, 126 Am. St. Rep. 677.
6. Administration of Chloroform to Female to Accomplish Rape. Harlan v. People (1904) 32 Colo. 397, 76 P. 792.
7. Throwing Vitriol. People v. Bracco (1893) 69 Hun, 206, 23 N. Y. S. 505, 10 N. Y. Cr. R. 438, 53 N. Y. St. Rep. 227.

Excessive Use of Habit Forming Drugs and Beverages

Certain drugs and beverages, narcotic or stimulant in their action, have legitimate uses. It is frequently necessary for physicians to administer such narcotics or anodynes to alleviate pain or to induce sleep. Many cases also require the use of some form of stimulant. But while the legitimate uses of such drugs and beverages are many and highly beneficial, the unwarranted or excessive use is exceedingly injurious and leads to many complications. It is not unusual to hear the term "dope fiend" or "drunkard" applied to excessive users of habit forming narcotics and liquors.

The excessive use of habit forming narcotic drugs and alcoholic liquors has been productive of many legal problems. Such use may so undermine the mental capacity of the user as to render him incapable of performing certain legal acts. It may destroy his capacity to make a will, or may be considered grounds for divorce, or may discredit his testimony as a witness in a trial.

Many statutes and ordinances have been enacted concerning the sale of habit forming narcotic drugs. A druggist must be careful not to violate any of these in force in his own community. Legal liability especially attaches to one who sells habit forming drugs to minors or to known addicts.

Wills—Testamentary Capacity Affected by Use of Drugs

In order that a will may be valid, testamentary capacity must exist at the time the will is executed. By testamentary capacity is meant the mind and memory to know the property about to be disposed of, the persons to whom it is to be given, and the manner in which he desires it to be distributed. A person may use drugs to excess and yet be competent to make a will, if at the time of its execution he has the requisite testamentary ca-

capacity. This question has been a fruitful source of litigation. As a fact, but few wills have been set aside on an allegation that the testator was under the influence of liquor or of a drug at the time of their execution. The general rule as to incompetency is: "Where testator has been an excessive user of intoxicating liquors or drugs so as to impair his mind, so that, at the time the will is executed he does not know the extent and value of his property, the names of the persons who are the natural objects of his bounty, or the plan of the division of his property, he is not competent to make a will."

Testamentary Capacity Affected by Use of Drugs or Liquor

Digest of Cases:

1. Testator died of delirium tremens, but his will was executed during lucid interval, so held valid. *Crouzeilles' Succession* (1901) 106 La. 442, 31 So. 64.
2. The will was invalid because at the time of execution the testator was heavily dosed with morphine and other like drugs. *In re Lande's Estate* (1931) 183 Minn. 419, 236 N. W. 705.
3. Unsoundness of mind sufficient to affect testamentary capacity can be produced by the excessive use of narcotics and morphine, if the testator is so affected at the time of the execution of the will. *Naylor v. McRuer* (1913) 248 Mo. 423, 154 S. W. 772.

Readings: Effect of Drugs or Narcotics on Testamentary Capacity.

1. *Bush v. Lisle* (1889) 89 Ky. 393, 12 S. W. 762.
2. *Miller v. Oestrich* (1893) 157 Pa. 264, 27 A. 742.
3. *Payne v. Chance* (Tex. Civ. App. 1928) 4 S.W.(2d) 328.
4. *In re D'Avignon's Will* (1899) 12 Colo. App. 489, 55 P. 936.

Use of Drugs as Grounds for Divorce

The habitual use of drugs is not in itself cause for divorce, unless it can be shown that the use is excessive and is productive of some result such as cruelty, indignity, or lack of services, which generally by statute is made grounds for divorce. Usually a reformation, even after separation but before bringing proceedings for divorce based upon the excessive use of drugs, will defeat the suit. Conditions justifying the divorce must be actu-

ally in existence at the time the divorce is granted. The case of *Dawson v. Dawson*, 23 Mo. App. 169, shows the attitude usually taken toward habitual use of drugs. A wife was shown to be a confirmed user of opium in its various forms. She was, because of its use, subject to fits of extreme hilarity followed by complete prostration. The habit had become uncontrollable, and she would exercise her ingenuity to the limit in order to obtain the drug. She frequently left the house at night to get opium. She pawned her jewelry and sold products of the farm to obtain money for its purchase. She resorted to lying and every sort of subterfuge to keep from her husband the knowledge of her purchases. During a period of less than two years she had obtained possession of nearly two hundred bottles of opium in some form. It was held that under such circumstances the husband might obtain a divorce on the ground of indignities to the person rendering his condition intolerable.

Grounds for Divorce

Statute: One of the grounds for divorce in Colorado is as follows: "That the spouse from whom a divorce is sought has been a habitual drunkard or drug fiend for a period of one year next prior to the beginning of the action for divorce." Colo. C. L. 1921.

Reading: Use of Drugs as Grounds for Divorce.

Use of Opiates. *Gowey v. Gowey* (1906) 191 Mass. 72, 77 N. E. 526.

Actions—Habit Forming Drug

A druggist who sells habit forming drugs must be especially careful not to violate any statutes or ordinances governing such sales. A druggist who sells a habit forming drug to a minor makes himself liable to an action by the parents of such child. If it appears that the salesman knew, or had good reason to believe, that the drug was to be used to satisfy a craving caused by its habitual use rather than for medicinal purposes.

As in the case of parent and child, so in the case of husband and wife, the repeated selling of a drug to a customer may make the druggist liable in damages for resulting injury, if suit is brought by the husband or wife of such customer. This is held true, even though there is no specific statute creating such liability.

Action by Parent for Illegal Sale of Drug to Child

Case:

TIDD v. SKINNER.

Supreme Court of New York, Appellate Division, Third Department,
1916. 171 App. Div. 98, 156 N. Y. S. 885, 34 N. Y. Cr. R. 196.

A mother brings this action against a firm of druggists for having sold to her minor son a certain poisonous drug known as heroin. She alleges that as a result of these sales her son became a habitual user of heroin and thereby became a physical and moral wreck, unable to perform any labor, and that his health was ruined and his mind destroyed, whereby she was deprived of his services and has been greatly damaged. The plaintiff's husband, the father of the minor, was dead at the time of the acts complained of. The facts were submitted to a jury, and a verdict has been returned in favor of the plaintiff for \$2,000 compensatory damages and \$1,000 punitive damages.

Question: Whether there is an action by a parent against a druggist for illegal sales of heroin to a minor son, where the action is based on the principle of loss of services.

HOWARD, J. And we believe that the evidence shows that the plaintiff was, in fact, actually damaged. The proof shows that previous to his acquisition of the drug habit the young man earned considerable money. He was something over 18 years of age. The evidence as to his earning capacity was explicit, and much of it came from the mouth of a disinterested witness. The lad was employed at Schenectady by the General Electric Company, and an official in charge of the books was produced, and the exact amount of his earnings was shown. It appears from these books that his wages ranged from \$40 to \$50 a month. He also earned money as a singer, sometimes \$15 per week. He was also useful to his mother about the house, doing chores and doing errands and making himself useful in other ways, as dutiful boys of that age usually do. The compensatory damages fixed by the jury cannot, therefore, be said to be an exaggerated estimate.

The action is said to be a novel one. In some respects this is true, although the principle on which the cause of action is based is not novel, but has been known and recognized by the courts for centuries. By whatever name this action may go, the fact is that the property rights of the plaintiff have been trespassed upon and

she is simply suing for reimbursement. The services of her son, to which she was legally entitled, have been destroyed, so she alleged, and so the jury has found, and she is only asking pay for this damage done. The plaintiff bases her claim upon the same principle which underlies the cause of action accruing to a father in case of the abduction of his daughter, or to a husband in case of the alienation of his wife's affections. Precedent is not necessary in order that the plaintiff may recover here. If the rights of the plaintiff have been invaded, there must be redress.

Review of Tidd v. Skinner :

1. Why was the action brought by the mother?
2. What did she allege as her cause of action?
3. State the question.
4. Why was evidence introduced as to the earning capacity of the boy?
5. Why was the action a novel one?

Damages for Loss of Consortium

In *Flandermeyer v. Cooper* (see readings) Justice Donahue said: "This is not an action for damages for loss of support or loss of the earning capacity of the husband, but is wholly an action for damages for loss of consortium. Consortium is defined to be the conjugal fellowship of husband and wife, and the right of each to the company, co-operation and aid of the other in every conjugal relation. This right is involved whenever a third person, through machination, enticement, seduction, or other wrongful, intentional or malicious interference, deprives the husband or wife of the consortium of the other." This case was summarized by the court in these words: "One who with knowledge that a husband by the constant and continued use of morphine has become so weakened in body and mind that he is unable to resist his cravings for the drug and who after the repeated protests of the wife continues to sell morphine to the husband until by the use thereof his mind becomes so impaired and destroyed that it is necessary to confine him in an insane asylum, is liable to the wife for damages for loss of consortium."

Arrest of Drug Addicts

Statute: Whenever a complaint shall be made to any judge of the District Court that any person is addicted to the use of

ARTHUR DRUGS

drugs mentioned in this act in a manner contrary to the public welfare, such judge of the District Court must issue and deliver to some peace officer, for service, a warrant of arrest, directing that such person be arrested and brought before said judge for examination, and if, after said examination, said judge is satisfied that said person is addicted to the use of the drugs mentioned in this act, in a manner contrary to the public welfare, he may commit such person to a State, county, city, or other hospital or institution where facilities are provided for the treatment of drug addicts. Whenever it is made to appear to the judge of the District Court that such person is no longer addicted to the use of the aforesaid drugs in a manner contrary to the public welfare, or at any time in his discretion, he may order a discharge from such commitment. The provisions of this act shall not be construed to prohibit any person committed to any institution under its provisions from appealing for a review of the sufficiency of the evidence upon which the commitment was made. Mont. Rev. Codes 1921, § 3195.

Readings: Legal Liability on Sale of Habit Forming Drugs.

1. Heroin. Tidd v. Skinner (1919) 225 N. Y. 422, 122 N. E. 247, 3 A. L. R. 1145.
2. Laudanum. Hoard v. Peck (N. Y. 1867) 56 Barb. 202.
3. Morphine. Flandermeyer v. Cooper (1912) 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. (N. S.) 360, Ann. Cas. 1913A, 983.
4. Opium. Moberg v. Scott (1917) 38 S. D. 422, 161 N. W. 998, L. R. A. 1917D, 732.
5. City Ordinance may Forbid Sale of Habit Forming Drug. City of Chicago v. Brendecke (1912) 170 Ill. App. 25.

"Intoxication" Applies to Excessive Use of Liquors Only

As a general rule, the word "intoxication" is applied only to conditions produced by the use of intoxicating liquors, and not to the results produced by the use of opiates, or other narcotic drugs. In State v. Kelley, 47 Vt. 298, it is stated that "It is sometimes said that a person is intoxicated or drunk with opium or with ether, or with laughing gas. But it is always felt and understood that such is an unusual and forced use of the words 'intoxicated, drunk,' and the addition to them is needful in order

to prevent misapprehension of the sense in which those words are used."

Readings: Intoxication Not the Result of Use of Opiates. "Habitual drunkenness" not the result of using opiates. *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806, 6 L. R. A. 548, 17 Am. St. Rep. 313.

CHAPTER 17

LIABILITY OF EMPLOYER FOR INJURIES
SUFFERED OR CAUSED BY
EMPLOYEES

"Respondeat Superior"

Respondeat superior implies a relation of superior and subordinate and means, in general, the responsibility of a principal for the acts of his agent. In other words, a master is responsible for the acts of his servants if the particular act causing an injury is within the scope of the servant's delegated authority and in his exercise of that authority.

Of course, if the servant is not engaged in his master's business but is impelled by his own personal motives, the doctrine does not apply. If an employee, to gratify his own feelings, of resentment, whether provoked or unprovoked, commits an assault upon another, the wrong can in no way be imputed to the employer, but is the sole responsibility of the employee. The act of the servant may be omission, commission, neglect, fraud, or deceit. If it is done in the course of employment, the master is liable, though he had not authorized it and even had forbidden the servant so to act. The protection of the employer lies in his selection of employees.

Employer Liable for Indecent Assault Made by Employee

The defendant was engaged in making and selling surgical appliances and in diagnosing and prescribing for persons suffering from injured or deformed feet or limbs. An employee in making the proper adjustment of an appliance made an assault upon the patient. The court held the employer liable on the ground of an implied contract for decent treatment arising out of the confidential relations of the contract of employment. The language of the court is: "Where a person so enters into such an agreement with a corporation (defendant) and submits to an examination pursuant to such agreement, there is an implied contract that the patient will be treated, not only skillfully, but decently, respectfully, and courteously. Decent and respectful treatment is implied in the contract from the confidential re-

lation of the parties, and especially because of the necessary exposure of the person of the patient in connection with the services to be performed pursuant to the contract. The implication arises whenever one person is placed in the control or protection of another. It grows out of the peculiar and special relationship." *Stone v. William M. Eisen Co.* (1916) 219 N. Y. 205, 114 N. E. 44, L. R. A. 1918B, 291.

Liability of Employer for Injury Caused by Malicious Act of Employee

Case:

PETER ANDERSON & CO. v. DIAZ.

Supreme Court of Arkansas, 1906. 77 Ark. 606, 92 S. W. 861, 4 L. R. A. (N. S.) 649, 113 Am. St. Rep. 180.

Appellant was a corporation carrying on a retail liquor business in Batesville, Ark. Arthur Anderson was in its employ as bartender. The appellee alleges: That on the 12th day of January, 1903, the plaintiff was an occupant and patron of the defendant corporation's place of business in its saloon at Batesville, Ark., and that while in said house he became somewhat intoxicated, and had lain down and was asleep in said defendant's house. That while so asleep he was assaulted by one A. Ramsey Weaver, who was a patron of said company, and Arthur Anderson, who was at the time in the service of said saloon company as bartender, in a most brutal, wanton, malicious, and cruel manner, by pouring alcohol on the plaintiff's foot and setting fire to the same, by reason of which the plaintiff's foot was severely burned before he could extinguish the fire. That said Arthur Anderson furnished the alcohol to the said Ramsey Weaver from defendant company's saloon, and aided, assisted, and abetted the said Ramsey Weaver in putting the same upon the foot of the plaintiff, and also himself poured some of the alcohol on plaintiff's foot. That, by reason of said assault, this plaintiff was severely burned, and suffered, and has suffered since said time, and continues to suffer, the most excruciating and painful agony to which human beings are subjected. The damages were laid at \$5,000, for which judgment was asked. The answer denied the allegations of the complaint. There was proof to support the allegations of the complaint. There was no proof and no claim that appellant was negligent in employing or retaining its bartender, Arthur Anderson. The cause was submitted to the jury upon the proof and instructions, and they returned a verdict

for \$1,000, and judgment was entered accordingly, which this appeal seeks to reverse.

Question: Was the employer liable for the wrongful act of his employee?

WOOD, J. The cruel act of its agent, Arthur Anderson, was clearly beyond the line of his employment. The master is not liable for the acts of his servant that are beyond the scope of his employment. Cooley on Torts, p. 627. "Where a servant quits sight of the object for which he was employed, and without having in view his master's orders, pursues that which his own malice suggests," the master will not be liable for his acts. *McManus v. Prickett*, 1 East, 106. The "test," says the Supreme Court of Nebraska, of the master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business. *Davis v. Houghtellin*, 33 Neb. 582, 50 N. W. 765, 14 L. R. A. 737. [The corporation not liable.]

Review of *Peter Anderson & Co. v. Diaz*:

1. State the important facts.
2. Give the question involved.
3. What was the decision?
4. Why was the corporation not liable?
5. When is a master liable for the acts of his servant?
6. What was the test given by the Nebraska court?

Readings: Liability of Employer for Assaults Committed by Employee.

1. Selection and Retention of Clerks. *Swinarton v. Le Boutillier* (1894) 7 Misc. 639, 28 N. Y. S. 53, affirmed (1896) 148 N. Y. 752, 43 N. E. 990.
2. Assault on Patron by Servants. *Chase v. Knabel* (1907) 46 Wash. 484, 90 P. 642, 12 L. R. A. (N. S.) 1155.
3. Saloon Keeper Liable for Act of Bartender in Injuring a Customer. *Curran v. Olson*, 88 Minn. 307, 92 N. W. 1124, 60 L. R. A. 733, 97 Am. St. Rep. 517.
4. Proprietor Bound to Protect Customers. *Rommel v. Schambacher*, 120 Pa. 579, 11 A. 779, 6 Am. St. Rep. 732.

Practical Jokes—Master Not Liable for Injuries Caused

The intentional act of coemployee during lunch hour in jerking a chair from under another employee, thus causing her to fall and sustain personal injuries, was held not within the scope of employment, and the employer was not liable for the injuries. The court quoted the rule: "The master is not liable for an injury occasioned by sportive acts or horse play not in the scope and course of employment." The intentional act was entirely independent of the employment, and there was no connection between the required work and the act which resulted in the injury. *Gens v. Wagner Electric Mfg. Co.* (1930) 326 Mo. 503, 31 S.W. (2d) 785.

Practical Jokes—Master Liable for Injury Caused

The plaintiff had ordered and expected to receive from the defendant a loaf of bread, and in sending the bread to her home the defendant's manager, in the performance of his duty while acting within the scope of his employment, had carelessly and negligently performed his duty in substituting a dead rat for the bread, and that, when plaintiff opened the package containing the rat, she was so frightened that she became a "nervous wreck." The court decided that the master is responsible for the wrongful acts of his servant, even though they were willful or reckless, if the act done by the servant be within the act of his employment and in the furtherance of his master's business. *Great Atlantic & Pacific Tea Co. v. Roch* (1931) 160 Md. 189, 153 A. 22.

False Arrest

Under any circumstance the act of causing the arrest of a person or having him imprisoned is likely to lead to serious trouble. This is especially true when it turns out to be a false arrest and imprisonment. It occasionally happens that a clerk causes the arrest of some person in or about the premises of his employer. If it proves to be a false arrest, a question of legal liability is immediately raised. The liability of the employer for the act of his clerk in causing a false arrest depends upon whether the employer had previously authorized the act or subsequently ratified it, or whether the act was within the scope of the clerk's employment. The authority need not be expressly conferred, but

may be implied from the previous conduct or relationship of the parties. In an action against the employer for false arrest or false imprisonment, caused by the employee, the employer becomes liable on a showing that the clerk had express or implied authority to cause the arrest. The question of liability is answered in *Fisher v. Westmoreland*, 101 Miss. 180, 57 So. 563, Ann. Cas. 1914B, 636: "The principal is liable for the act of his agent in instituting a criminal prosecution maliciously and without probable cause, if the institution of such prosecution was expressly authorized or subsequently ratified by the principal, or was within the scope of the agent's employment."

There is only one safe rule, and that is for an employer never to give an employee authority to cause arrests and never to ratify an arrest when caused by a clerk.

The fact that the employer is liable in no way lessens the liability of the clerk. He is responsible for his own acts to the same extent as if he were not so employed. The employer is generally sued on the theory that a judgment secured against him could be paid.

False Arrest Caused by Negro "Soda Jerker"

Case:

BUSHARDT v. UNITED INVESTMENT CO.

Supreme Court of South Carolina, 1922. 121 S. C. 324, 113 S. E. 637, 35 A. L. R. 637.

This was an action for damages on account of alleged false imprisonment arising out of the following facts: On or about the 20th of January, 1921, F. S. Strickland, a police officer, the chief of detectives of the city of Columbia, received a report of the commission of a robbery at a store in Washington street in said city. The information was conveyed to him by a negro boy, who worked "in the front of the Regal Drug Store" as a "soda jerker." The boy claimed to have been held up at the point of a pistol and "robbed of what cash was in the register that night," and gave the officer a description of the man who had committed the crime. The officer proceeded to investigate, and the next day had the boy with him the greater part of the morning looking for the man. After the boy had left him, Detective Strickland saw Mr. Bushardt, the plaintiff in this action, standing at the post office wearing an overcoat that fitted the description given him. The officer did not immediately arrest

Mr. Bushardt, but invited him to get into the car with him and drive down the street, telling Bushardt that he wished to have a party look at him. Bushardt did not know Strickland was a police officer, went with him willingly, and makes no claim that he was then subjected to restraint or compulsion of any kind. They drove to the Regal Drug Store. The negro boy, the "soda jerker" was called out, and, "after Bushardt had got on the ground, the boy said, 'That is the man.'" The officer asked Bushardt to go in the store, get down behind the counter, and stand at the cash register. The boy was cautioned to be "sure." He insisted that Bushardt was the man who held him up. The plaintiff testified: "He (the boy) said, 'Carry him on, I know that is the man.' Upon that statement, Mr. Strickland carried me to the city jail."

Mr. Strickland, who testified as a witness for plaintiff, said: "On the strength of that identification, I took him to jail,—the boy identified the man—that was all. Upon his saying that was the man and to hold him, I did so."

The plaintiff, who was a nonresident white man, about 28 years of age, and, as the record indicates, of good character, was held in jail until the following morning, when he was discharged by the recorder. He then brought this action against the defendant, the corporation that owns and operates the Regal Drug Store, for false imprisonment. From judgment on verdict for the plaintiff, the defendant appeals.

Question: Whether a soda fountain clerk in a drug store had implied authority to institute criminal proceedings on a charge of robbery on behalf of the master so as to make the master liable in damages for the false imprisonment, though the stolen property was in the custody of the clerk.

MARION, J. Even if the arrest and detention of the plaintiff were not lawful, we think defendant was entitled to a nonsuit upon the second ground assigned (subdivisions "b" and "c" of exception 2), viz. that the relation of master and servant shown to exist between the soda clerk and the defendant did not, under the facts established, impose upon the defendant as master liability for the conduct of the servant in causing the arrest and detention of plaintiff. There is not a scintilla of evidence that any agent or servant of the defendant corporation other than the negro boy employed as a "soda jerker" had anything whatever to

do with the arrest or detention of the plaintiff. It is "well settled that the liability of a principal for the act of the agent in instituting a malicious prosecution or causing a false arrest or imprisonment is dependent on whether the principal previously authorized the act, or subsequently ratified it, or whether the act was within the scope of the agent's employment." Note, *Fisher v. Westmoreland*, Ann. Cas. 1914B, 638. There is no evidence to support an inference that the conduct of the negro boy in the case at bar was previously authorized or subsequently ratified by any one connected in any capacity with the defendant. The only basis upon which the responsibility of the defendant can be predicated is that the act of the boy in causing the arrest and detention of the plaintiff was within the scope of his employment as a clerk in the drug store. It is inferable from the testimony that the "cash in the register," alleged to have been taken by the robber, was in the custody of the boy at the time of the robbery, and was the property of the defendant. But robbery is an offense both against the person and against the property. It was not only the personal right of the boy, but his duty, in the circumstances to take steps to apprehend the supposed felon and to bring him to justice. The nature of the alleged crime charged it with a peculiar personal interest for the boy. In the absence of any fact or circumstance tending to establish that the boy was acting for his employer and not for himself, it certainly cannot be assumed that he acted in this matter as a servant engaged in the master's business, and not on his own initiative and on his own account.

Review of Bushardt v. United Investment Co.:

1. What was the form of the action?
2. State the material facts.
3. Why was the corporation made defendant?
4. Why was the defendant entitled to a nonsuit?
5. The liability of the master for a false arrest caused by a servant depends upon proof of what facts?
6. Was there any proof that the master had ever authorized or ratified the authority of the servant to cause the arrest?
7. Was the act of the boy within the scope of his authority as a servant?
8. In this particular instance, was the boy acting for his master or for himself?

9. Why was not the boy sued for the damages he had caused?
10. Formulate a rule governing the liability of the master for the act of his servant in causing a false arrest.

Treatment of Person Arrested

Digest of Case:

A person who has been arrested and charged with a crime may lawfully be finger-printed, measured, and photographed by police without his consent. *Bartella v. McFeeley* (1930) 107 N. J. Eq. 141, 152 A. 17.

Readings: Liability of Employer for False Arrest Caused by Employee.

1. Act of Arrest Ratified. *Simmon v. Bloomington* (1903) 39 Misc. 847, 81 N. Y. S. 499.
2. Floorwalker Caused an Arrest. *Cobb v. Simon* (1903) 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909.
3. Clerk Caused Arrest of Customer. *Rigby v. Herzfeld-Phillipson Co.* (1915) 160 Wis. 228, 151 N. W. 260.

Fellow-Servant Doctrine

A firmly established general principle of law is to the effect that an employer or master is not responsible for injuries suffered by them because of the carelessness, negligence, or misconduct of fellow servants of the same employer engaged in the same common employment. It is a duty imposed by law upon the employer to provide safe and suitable tools, machinery, and appliances. If he meets these legal requirements, he may not be considered liable for an injury to one of his servants as a result of the abuse or misuse of the instrumentalities on the part of another servant or employee. This rule in many states has been changed by statute and especially by employers' liability acts.

Workmen's Compensation and Employers' Liability Acts

The law relating to the liability of employers for injuries to employees, occurring during the course of employment developed under primitive conditions, and as applied to the conditions existing to-day, has not proved adequate. For this reason, practically every state has passed "Workmen's Compensation Acts"

in an effort to adjust the liability of employers to changed conditions and to provide compensation for industrial accidents. The general tendency of these statutes has been to abolish or to modify some of the common-law doctrines, as "the fellow-servant rule," the common-law defense of "contributory negligence," and the doctrine of "assumed risk."

Assumed Risk Compared to Contributory Negligence

Justice Jenkins of Texas distinguished between assumed risk and contributory negligence as follows: "'Assumed risk' and 'contributory negligence' are sometimes loosely treated as synonymous. This, perhaps, for the reason that the same act may constitute both assumed risk and contributory negligence. * * * But there is a well-recognized distinction between assumed risk and contributory negligence. Contributory negligence implies fault or a breach of duty on the part of the injured party, either by doing or by failing to do something that a reasonably prudent man would not have done, or would not have failed to do, to avoid being injured under the same or similar circumstances. On the other hand, there is a certain amount of danger incident to many employments, which ordinary prudence cannot always avoid. Where these are known to the employé, they are assumed by him as an implied part of his contract of employment. An employé assumes the risk of those dangers known to him to be ordinarily incident to the labor which he has agreed to perform, or which are so obvious that a man of ordinary intelligence and prudence must necessarily be presumed to have learned of them in the ordinary course of his employment." *Gulf, C. & S. F. R. Co. v. Cooper* (Tex. Civ. App. 1917) 191 S. W. 579.

Injury to Servant by Disinfectant

Digest of Cases:

1. An illiterate employee, who knows nothing of chemical gases, is not negligent in continuing work after the foreman assured him the fumigants were not poisonous. *Louisville & Nashville Railroad Co. v. Gilliland* (1927) 220 Ky. 431, 295 S. W. 422, 53 A. L. R. 386.

2. The defendant was held liable for injury to employee when caustic soda was substituted for common washing soda, without notice to employees, and in consequence an injury resulted. *Solomon v. Cudahy Packing Co.* (1917) 256 Pa. 19, 100 A. 490.

3. The defendant, knowing of the presence of potash in the place of employment, was negligent in not disclosing the fact, or in not cautioning the employee against the risk to be encountered from contact with it. *Dunn v. Connell* (1897) 21 Misc. 295, 47 N. Y. S. 185.

CHAPTER 18

SALES OF MISCELLANEOUS ARTICLES OF MERCHANDISE

Articles Other Than Drugs now Sold by Pharmacists

In addition to the compounding and filling of prescriptions and the sale of drugs, poisons, medical stores, instruments, and supplies which formerly constituted the main business of the keeper of a drug store, have been added, in recent years, the sale of beverages, ice cream, etc., so it has not been considered amiss to include in this text some of the regulations concerning the ingredients and sale of ice cream. These provisions are generally health measures or for the prevention of fraud and deception.

Ice Cream—State and Municipal Regulations

The legislature of a state may enact laws to prevent fraud in the sale of ice cream, and in so doing may establish a reasonable standard percentage of butter fat which shall be contained in ice cream sold. This may be a health measure or merely to prevent fraud and deception. The purpose is to suppress false pretenses and to secure honest dealing in the sale of an article of food.

City ordinances may be passed to regulate the sale of ice cream within the city. These ordinances must be reasonable or they will be held void by the courts. Some city ordinances require a license by one selling ice cream.

Readings: Ice Cream—State and Municipal Regulations.

1. State Regulations. *Commonwealth v. Crowl*, 245 Pa. 554, 91 A. 922.
2. Municipal Regulations. *Rigbers v. Atlanta*, 7 Ga. App. 411, 66 S. E. 991.
3. License to Sell Ice Cream. *Syracuse Ice Cream Co. v. Cortland*, 153 App. Div. 456, 138 N. Y. S. 338.

Retailer Sued for Injury Caused by Eating Ice Cream

Case:

RACE v. KRUM.

Court of Appeals of New York, 1918. 222 N. Y. 410, 118 N. E. 853,
L. R. A. 1918F, 1172.

The plaintiff brought an action to recover damages for personal injuries alleged to have resulted from the consumption by plaintiff of unwholesome and poisonous ice cream, sold to him by the defendant.

On the 22d of June, 1911, defendant conducted a drug store in the city of Albany, and, in connection with and as a part of such business, sold ice cream, to be consumed in the store. Some time during the evening of that day plaintiff, with two companions, entered the store and asked that each be served with ice cream, which was done; the two companions being served from one can and plaintiff from another. Plaintiff complained of the quality of the cream served him, and ate only a part of it, stating, "It was no good; there is something the matter with it." He then left the store, and as he did so the clerk who waited upon him examined the ice cream and stated, "There is something wrong with that." Within a very short time thereafter, plaintiff was taken violently ill, and remained so for several days.

Question: Whether a druggist selling ice cream for consumption on the premises warrants it to be fit for human consumption.

McLAUGHLIN, J. As to the first contention, there certainly was some evidence tending to establish that plaintiff's illness was caused by the presence of a poison known as tyrotoxin in the ice cream; that such poison is a filth product, found only in milk and milk products, including ice cream. Having ascertained from the record that there is some evidence to support the finding of the jury that there was tyrotoxin in the cream, and that the same was the cause of plaintiff's illness, this court is precluded from making a further examination on that subject. The question whether there is any evidence to support a finding of fact is one of law, which, when the affirmance by the Appellate Division is not unanimous, is reviewable by this court. When, however, it has found there is such evidence, the question is no longer one of law, and the decision of the court below upon the facts is final.

As to the second contention, I am of the opinion the trial court did not err in instructing the jury that, when defendant sold the cream to plaintiff, he impliedly warranted it was wholesome and fit to eat. In this connection, however, it must be borne in mind that we are not dealing with the liability of hotel proprietors, restaurant keepers, dining car managers, or people engaged in business of that kind, but are considering solely the liability of a dealer, who makes or prepares the article that he is selling. As to such dealer we believe the instructions were proper. The general rule, established by the weight of authority in the United States and England, is that accompanying all sales by a retail dealer of articles of food for immediate use there is an implied warranty that the same is fit for human consumption.

This rule is based upon the high regard which the law has for human life. The consequences to the consumer resulting from consumption of articles of food sold for immediate use may be so disastrous that an obligation is placed upon the seller to see to it, at his peril, that the articles sold are fit for the purpose for which they are intended. The rule is an onerous one, but public policy, as well as the public health, demand such obligation should be imposed. The seller has an opportunity, which the purchaser does not, of determining whether the article is in the proper condition to be immediately consumed. If there be any poison in the article sold, or if its condition render it unfit for consumption, and the consumer be thereby made ill, some one must of necessity suffer, and it ought not to be the one who has had no opportunity of determining the condition of the article, but rather the one who has at his command the means of doing so.

Review of Race v. Krum:

1. Why was the action brought?
2. State the facts out of which the litigation arose.
3. What was the principal question?
4. Why must the plaintiff establish that his illness was caused by eating the ice cream?
5. How did the trial court instruct the jury?
6. What is the general rule established by the weight of authority?
7. What is this rule based upon?
8. Why is this an onerous rule?
9. Why must such a rule be imposed?

10. Why did the court make it clear that it was not dealing with the liability of hotel proprietors, restaurant keepers, and dining car managers?

Ice Cream

Digest of Cases:

1. Manufacturing ice cream in populous district, causing noises early and late, constituted a nuisance. *Shea v. National Ice Cream Co.* (1932) 280 Mass. 206, 182 N. E. 303.
2. Statute prohibiting producing in, or sending into, District of Columbia for sale milk, cream, or ice cream without health officer's permit held not unreasonable, oppressive, or absurd. *Leaman v. District of Columbia* (1931) 60 App. D. C. 395, 55 F.(2d) 1020.

Readings: Liability for Sale of Ice Cream and Other Foods.

1. Liability of Manufacturer of Food. *Parks v. C. C. Yost Pie Co.* (1914) 93 Kan. 334, 144 P. 202, L. R. A. 1915C, 179, 7 N. C. C. A. 100.
2. Validity of Regulation. *Hutchinson Ice Cream Co. v. State of Iowa* (1916) 242 U. S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643.
3. Regulation of Ice Cream. *City of New Orleans v. Toca* (1917) 141 La. 551, 75 So. 238, L. R. A. 1917E, 761, Ann. Cas. 1918B, 1032.
4. State or Municipal Regulations of Ice Cream. *Crowl v. Commonwealth of Pennsylvania* (1916) 242 U. S. 153, 37 S. Ct. 28, 61 L. Ed. 217, Ann. Cas. 1917B, 643.

Food Served in Public Eating House

As a general rule, one who sells food at a public eating house, to be consumed where sold, is presumed to know the wholesome or unwholesome condition of the food sold. The seller is bound therefore to use due care to see that the food he serves is fit for human consumption, and also that it may be eaten without injury to his patrons. For any injury which is caused by his negligence or failure to perform his duty to his patrons, he may subject himself to suit.

Readings: Liability in Serving Food.

1. Tack in Blueberry Pie. *Ash v. Childs Dining Hall Co.* (1918) 231 Mass. 86, 120 N. E. 396, 4 A. L. R. 1556.

ARTHUR DRUGS

2. Tooth Broken by Foreign Substance in Food. *Rosenswaike v. Interborough Rapid Transit Co.* (Sup. 1919) 175 N. Y. S. 828.
3. Mouse in Food. *Barrington v. Hotel Astor* (1918) 184 App. Div. 317, 171 N. Y. S. 840.

Food Sold by a Dealer to a Dealer

Digest of Case:

In the sale of provisions by one dealer to another dealer in the course of general commercial transactions, the maxim *caveat emptor* applies, and there is no implied warranty or representation of quality or fitness; but, when articles of human food are sold to be consumed for immediate use, there is an implied warranty or representation that they are sound and fit for food. *Nelson v. Armour Packing Co.* (1905) 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237.

Tobacco Not a Medicine

In some cities there are ordinances which make it unlawful for a business house to open on Sunday with the proviso that the ordinance shall not prevent the necessary sale of drugs or medicines on that day. At times advantage has been taken of such a proviso, and attempts have been made to sell tobacco under the guise of sales of necessary drugs and medicines. The courts have usually held that tobacco, while it may possess certain medicinal qualities, cannot in its manufactured form of cigars and cigarettes be called a drug or medicine; nor can such a sale be classed as a work of necessity.

Readings: Tobacco Not a Drug or Medicine.

1. *Commonwealth v. Marzynski* (1889) 149 Mass. 68, 21 N. E. 228.
2. *Penniston v. City of Newnan* (1903) 117 Ga. 700, 45 S. E. 65.
3. *State v. Ohmer* (1888) 34 Mo. App. 115.

Law of Tobacco

Digest of Cases:

1. Whether cigar counter clerk's authority impliedly to warrant fitness of chewing tobacco was incidental to authority to sell

held for jury to determine. *Weiner v. D. A. Schulte, Inc.* (1931) 275 Mass. 379, 176 N. E. 114.

2. An excise in way of license fee lawfully may be laid upon vendors of tobacco measured by a percentage on sales. *Opinion of the Justices* (1933) 282 Mass. 619, 186 N. E. 490.

3. Manufacturer of plug tobacco, in which a fishhook was embedded, held liable for injuries caused thereby to one purchasing the plug from retailer, though tobacco is not food nor fishhook poison. *Corum v. R. J. Reynolds Tobacco Co.* (1933) 205 N. C. 213, 171 S. E. 78.

4. Although chewing tobacco is not a food, it comes within the rule which applies to all things manufactured for human consumption which are dangerous to health or life. *Liggett & Myers Tobacco Co. v. Rankin*, 246 Ky. 65, 54 S.W.(2d) 612.

State may Regulate Sale of Snuff

A North Dakota statute (Laws 1913, c. 271) made it unlawful "to import, manufacture, distribute * * * or give away any snuff or substitute therefor, under whatever name called." The law defined snuff as "any tobacco that has been fermented, or dried, or otherwise treated, or any substitute therefor or imitation thereof, intended to be taken by the mouth or nose." The Supreme Court held that this statute was constitutional and that it could not be assailed upon the ground that it deprives any person of life, liberty, or property without due process of law. The court took judicial notice of the general fear in the community that drugs and opium are, and can be, more easily mingled with snuff and be less readily detected than in other forms of tobacco. *State v. Olson* (1913) 26 N. D. 304, 144 N. W. 661, L. R. A. 1918B, 975.

Liability of Retailer of Soap

It may seem unnecessary to include a discussion of soap in a treatise intended for druggists, yet, because from such a seemingly harmless article litigation has arisen, the topic is given a place here. In the Wisconsin case (see readings), injury was caused because of a foreign substance embedded in the soap. Two questions arise in this connection, one as to the liability of the retailer for damage arising from the use of soap sold by him, and the other as to the liability of the wholesaler or manufacturer. Generally speaking, the retailer is not liable for any such

injury, since soap is not in itself harmful and the seller would have no reason to suspect that there was any harmful substance in the particular soap sold by him. The question of the manufacturer's liability is discussed elsewhere in this book.

Needle in a Bar of Soap Caused Injury and Retailer was Sued

Case:

BARRANGO v. HINCKLEY RENDERING CO.

Supreme Judicial Court of Massachusetts, 1918. 230 Mass. 93,
119 N. E. 746.

This is an action against the retailer to recover damages for personal injuries received by the plaintiff while using a bar of soap in which a needle had become embedded.

Question: Whether the retail dealer was liable in selling the bar of soap, for its defective condition, which caused injury.

CROSBY, J. It is settled that, in the absence of negligence, a retail dealer in selling a commodity not inherently harmful or dangerous is not liable in tort for its defective condition which causes injury to another. * * *

There is nothing inherently dangerous in a bar of soap; and it does not appear how or when the needle became embedded in it, or that the defendant knew of its presence before delivering it to the plaintiff or could have known of it by the exercise of reasonable diligence. Whether it came there during the process of manufacture or afterwards is wholly a matter of conjecture.
* * *

As there was no evidence to warrant a finding that the defendant was negligent, the presiding judge rightly directed a verdict for the defendant.

Review of Barrango v. Hinckley Rendering Co.:

1. State the question.
2. Why did the court say the defendant was not negligent?
3. Why should the retailer not be liable under the facts of the case?
4. State the rule.

Readings: Liability in Manufacture and Sale of Soap.

1. Manufacturer of Soap Liable. *Armstrong Packing Co. v. Clem* (Tex. Civ. App. 1912) 151 S. W. 576.
2. Retail Dealer Not Liable. *Hasbrouck v. Armour & Co.* (1909) 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876.
3. Soap Not Inherently Dangerous. *Slattery v. Colgate*, 25 R. I. 220, 55 A. 639.

Cigarettes

Questions concerning the sale and manufacture of cigarettes have received much attention from various state legislatures and from the governing bodies of cities and towns. Doubt has arisen as to the validity of such legislation. Investigation shows that it is within the police power of a state or a municipality to regulate or prohibit the manufacture or sale of cigarettes. An ordinance requiring special licenses for all persons selling cigarettes is valid, and a license fee may be charged. Special regulations concerning the places in which cigarettes may be sold and the class of persons who may be permitted to purchase them are valid, as, for example, an ordinance prohibiting the granting of a license to sell cigarettes within 200 feet of any schoolhouse, or one prohibiting the sale to minors. However, a state does not have power to prohibit the circulation within its boundaries of a newspaper published in another state which contains an advertisement of cigarettes. This was held in *Post Printing & Publishing Co. v. Brewster* (see readings). In a similar case, a city ordinance prohibiting the smoking of cigarettes anywhere within the corporate limits was held unreasonable, and hence invalid.

Unlawful to Sell Cigarettes by Slot Machines

Digest of Case:

A statute in Virginia makes it unlawful to operate slot machines for disposition of cigarettes. *Macke v. Commonwealth* (1931) 156 Va. 1015, 159 S. E. 148.

Readings: The Law of Cigarettes.

1. Cigarette Advertisements. *Post Printing & Publishing Co. v. Brewster* (D. C. 1917) 246 F. 321.
2. Prohibiting Sale of Cigarettes. *State of Kansas v. Nosaman* (1920) 107 Kan. 715, 193 P. 347, 20 A. L. R. 921.

3. Cigarette Smoking. *Hershberg v. City of Barboursville* (1911) 142 Ky. 60, 133 S. W. 985, 34 L. R. A. (N. S.) 141, Ann. Cas. 1912D, 189.
4. Prohibiting Use of Tobacco in Any Form. *City of Zion v. Behrens*, (1914) 262 Ill. 510, 104 N. E. 836, 51 L. R. A. (N. S.) 562, Ann. Cas. 1915A, 1057.
5. Assault by Taking Cigarette from Another's Mouth. *Liljegren v. United Rys. Co. of St. Louis* (Mo. App. 1921) 227 S. W. 925.
6. Unauthorized Use of Photograph on Cigar Band. *Atkinson v. John E. Doherty & Co.* (1899) 121 Mich. 372, 80 N. W. 285, 46 L. R. A. 219, 80 Am. St. Rep. 507, 6 Detroit Legal News, 482.
7. License of 'Ten Dollars a Month to Sell Cigarettes. *In re May* (C. C. Mont. 1897) 82 F. 422.
8. Legislature may Restrict Tobacco Advertising. *State v. Packer Corporation* (1931) 77 Utah, 500, 297 P. 1013.

Fireworks—Sale to Small Children

There are many instances where small children have been injured by fireworks, and in consequence of such injuries lawsuits have resulted. The rule governing the liability of the retailer is briefly stated in the Minnesota case cited to be read. "The law requires of him who deals in articles inherently dangerous in the use for which they are intended to refrain from placing the same in the hands of a child of tender years. If the child is too young to realize the character of the thing sold him, it is the duty of the dealer to refrain from selling him such article, and where such sales are made the seller is liable for the consequences naturally resulting therefrom."

Manufacturer of Sparklers Liable for Injury to Child

Digest of Case:

A manufacturer of sparklers, consisting of wires with a combustible substance throwing off glowing particles when lighted, and described on the package as a harmless amusement for children, if the glowing end of the wire was not touched, held liable for injuries to a child who purchased a package from a merchant and while moving a lighted sparkler set fire to her dress. *Henry v. Crook* (1922) 202 App. Div. 19, 195 N. Y. S. 642.

Readings: Selling Dangerous Merchandise to Children.

1. Retailer Sold Sparklers. *Schmidt v. Capital Candy Co.* (1918) 139 Minn. 378, 166 N. W. 502.
2. Manufacturer Liable. *Henry v. Crook* (1922) 202 App. Div. 19, 195 N. Y. S. 642.
3. Toy Air Gun. *Harris v. Cameron* (1892) 81 Wis. 239, 51 N. W. 437, 29 Am. St. Rep. 891.
4. Manufacturer of Sparkler. *Beznor v. Howell et al.* (1930) 203 Wis. 1, 233 N. W. 758.
5. White Phosphorus Match Law. 26 USCA §§ 661-676.
6. Toy Pistols Sold for Resale. *Pizzo v. Wiemann*, 149 Wis. 235, 134 N. W. 899, 38 L. R. A. (N. S.) 678, Ann. Cas. 1913C, 803.
7. Manufacturer Liable in Three Situations. *Hasbrouck v. Armour & Co.*, 139 Wis. 357, 121 N. W. 157, 23 L. R. A. (N. S.) 876.

Liability on the Sale of Appliances for Curative Purposes

Case:

HARMON v. PLAPAO LABORATORIES.

Court of Appeals of Missouri, 1920. 218 S. W. 701.

This is an action for damages alleged to have occurred to plaintiff on account of the defendants selling to plaintiff an appliance manufactured by defendants and designed for the treatment of hernia or rupture, and which the plaintiff used as directed by the defendants, to her damage.

The petition charges that the defendant is engaged in the sale and manufacture of plasters, adhesive and other appliances, and medical and chemical devices; that on March 9, 1916, through her husband, she purchased three pads, advertised and known as "Stuart's Adhesif Plapao Pads," for rupture, and that the same were delivered to her by the defendant; that the pads were highly recommended for the cure of rupture by the defendants, and that the defendants represented that the pads were perfectly safe and absolutely harmless, and that the plaintiff was measured for them, and that the pads so purchased were made to fit her; that the plaintiff, relying upon said representations, and believing that the said pads were harmless and would cure her, wore one of said pads in accordance with the directions given her by the defendants, and that by reason thereof plaintiff was injured by the use of said pad between April 9 and May 22, 1916.

There was further evidence on behalf of plaintiff tending to show that the pads sold to plaintiff contained, among other ingredients, tannic acid and lanolin; that tannic acid is a powerful astringent, and, when used for any length of time under pressure, will become an irritant; that tannic acid itself would not penetrate to the interior of the abdomen, but that, when used in connection with lanolin, which is a penetrating vehicle, it would penetrate into the abdomen. It was further shown that, in the event glycerine was used in connection with tannic acid, this would prevent the harmful effects of tannic acid, and, in fact, if used in the right proportion, would render the tannic acid harmless.

Question: Whether there was evidence of negligence on the part of the defendant in the sale of pads by the defendant as a cure for rupture.

BIGGS, C. We think, under the evidence, the case was for the jury, and that if the defendant sold to the plaintiff the pads, representing them to be beneficial and harmless, and that the plaintiff used said pads as directed by defendant, and that the said pads contained deleterious, irritant, and corrosive ingredients, which caused plaintiff's injury, and that the defendant knew, or should have known through the exercise of ordinary care, the character of said pads, then defendant would be liable.

Review of Harmon v. Plapao Laboratories:

1. What charges did the plaintiff make against the defendant?
2. What negligence on the part of the defendant was stated in the petition?
3. State the rule of law.

Sale of Dangerous Articles—Duty to Give Warning

Great injury may result to life and property when an article inherently or essentially dangerous is put into circulation without the proper warnings. The law is well settled that any one who sells and delivers an article intrinsically dangerous to life or property, knowing such dangerous qualities, and fails to give proper notice, is liable to any person whose injury is the natural and probable consequence of the seller's negligence. The liability is apart from any statute or any warranties that may have

been made at the time of the sale. This rule of dangerous instrumentalities has been applied to the sale of many articles, such as powder, explosives, illuminating gas, food, feed for cattle, drugs, poisons, and medicines. The liability is imposed on the seller because in his position he should have superior knowledge of the dangerous qualities of the article he is selling. If, then, the purchaser is made fully aware by the salesman of the dangers involved, there can be no recovery.

Stove Blacking as a Dangerous Article

Case:

CUNNINGHAM v. C. R. PEASE HOUSE FURNISHING CO.

Supreme Court of New Hampshire, 1908. 74 N. H. 435, 69 A. 120, 20 L. R. A. (N. S.) 236, 124 Am. St. Rep. 979.

Action for personal injury caused by an explosion of stove blacking. The manufacturers of a stove blacking advertised it and stated that it was for sale by the defendants. The plaintiff's mother called at the defendant's store and inquired whether the advertised stove blacking was intended for stovepipes or for stoves. He replied that it was intended for stoves, and said that "the warmer the stove the better it works." Relying upon this representation, the mother of the plaintiff bought some of the polish, and later her daughter, a member of the family, used some of it on a hot stove, when an explosion occurred, causing the injury.

Question: Whether one who represents that a certain stove polish sold by him to be used with safety upon a hot stove is liable to the purchaser or to a member of his family injured by an explosion of such polish.

YOUNG, J. The defendant's position is like that of one who puts destructive * * * materials in situations where they are likely to produce mischief. Such a person must respond in damages to those who are injured because of his acts, if he either knew, or ought to have known, that the materials were dangerous and that the persons injured might come in contact with them.

Review of Cunningham v. C. R. Pease House Furnishing Co.:

1. What was the purpose of the action?
2. Why was the retailer made defendant?
3. Why could the plaintiff recover when she was **not** the customer?
4. What was the negligence of the seller?
5. What was the question?
6. Under what circumstances would the manufacturer **have** been liable?
7. **Formulate the rule.**

Powder Sold to an Infant

Quotation from *Carter v. Towne*, 98 Mass. 567, 96 Am. Dec. 682: "The plaintiff was a child eight years old, had neither experience nor knowledge in the use of gunpowder, and was an unfit person to be intrusted with it; that the defendants, knowing all this sold and delivered to him two pounds of gunpowder; and that he, in ignorance of its effects, and using that care of which he was capable, exploded it, and by the explosion was severely injured. This injury was clearly, within the authorities above cited, the proximate and natural consequence of the defendant's negligence in selling a dangerous article to a child whom they knew to be, by reason of his youth and ignorance, unfit to be trusted with it, and who probably, therefore, as they had reason to believe, might innocently and ignorantly play with it to his own injury. The case cannot be distinguished in principle from that of a man who delivers a cup of poison to an idiot, or puts a razor into the hand of an infant in its cradle. The want of any direct intention to injure does not excuse the defendants. Every man must be taken to contemplate the probable consequences of the act he does. * * * By the well-settled rule of the common law, a person who negligently uses a dangerous instrument or article, or causes or authorizes its use by another person, in such a manner or under such circumstances that he has reason to know that it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person injured who is not himself at fault."

Readings: Sale of Dangerous Articles.

1. Meaning of "Imminently Dangerous." 4 Words and Phrases, Third Series, 70; 2 Words and Phrases, Fourth Series, 266.

2. **Articles Imminently and Inherently Dangerous.** *Windram Manufacturing Co. v. Boston Blacking Co.* (1921) 239 Mass. 123, 131 N. E. 454, 17 A. L. R. 669.

Poisonous Articles of Merchandise Used for Purposes Other than That for Which Sold

In several important cases the question has been litigated whether the manufacturer of matches, fireworks, roach powder, and other articles of merchandise which contain poisonous ingredients must comply with the state statute requiring druggists and pharmacists who sell medicines belonging to the class of poisons to mark the container with the word "Poison." If such articles are used for other purposes than that for which they were sold, the manufacturer or seller is not usually held liable for injury caused by their use.

Articles of Merchandise Used for Purposes Other Than That for Which Sold

Digest of Cases:

1. The manufacturer of fireworks not liable in damages for death of child due to its eating such article. *Victory Sparkler Co. v. Price* (1927) 146 Miss. 192, 111 So. 437, 50 A. L. R. 1454.
2. Sale of correctly labeled poisonous oil of mirbane, but not labeled poison by the wholesale drug company, held not to be the proximate cause of the death. *Levin v. Muser* (1923) 110 Neb. 515, 194 N. W. 672.
3. No recovery in damages when deceased used large quantity of Roach Doom in coffee which caused his death. *McCrossin v. Noyes Brothers & Cutler, Inc.* (1919) 143 Minn. 181, 173 N. W. 566.
4. In an action against a druggist for failure to put "Poison" label on package, allegations must show causal connections between the negligence and the injury. *Martin v. Jonesboro Drug Co.* (1928) 7 La. App. 262.
5. Poison to destroy "Quack Grass." *Mossrud v. Lee* (1916) 163 Wis. 229, 157 N. W. 758, 17 N. C. C. A. 214.
6. Liability for damages to live stock through sale of poison in negligently concealed form. 17 N. C. C. A. 214-223.
7. Matches containing phosphorus have been held not to be included in a statute regulating the business of apothecaries and pharmacists. *In re Phosphorus Matches*, 21 Pa. Dist. 554.

Poison—No Label on Box of Matches*Case:***STASEK v. BANNER COFFEE CO.**

Supreme Court of Wisconsin, 1916. 164 Wis. 538, 159 N. W. 945.

An action for damages on account of the death of the plaintiff's daughter aged about 2 years and 3 months. The defendant grocery company delivered merchandise and each article was done up separately. The packages were left on a small platform in plaintiff's rear hall, the manner in which deliveries were customarily made. The deceased child opened the package containing matches and ate off the yellow phosphorus heads of nine or ten matches, from the effects of which she died about a week later. There was no poison label on the package or on the boxes themselves. There was a statute regulating the sale of poisonous drugs and chemicals, and requiring that the package containing them be labeled "Poison."

Question: Does this statute apply to the sales of articles of merchandise, such as phosphorus matches?

Held: The statute regulating the sale of poisonous drugs and chemicals plainly does not apply to the sale of articles of merchandise in whose manufacture some poisonous drug or chemical may have been incidentally used. To so hold would be to extend the act by construction to cases manifestly not intended to be covered by it.

When the jury found that the packages were delivered in the manner in which such deliveries were customarily made, and that the defendant could not have anticipated that injury would happen to another by reason of the manner of the delivery, they found the facts which absolutely negated actionable negligence. These findings of fact necessarily control the question of ordinary care, and justify the court in changing the answer to the third question of the verdict, and striking out the answer to the fourth question. If the delivery was made in the usual and customary way under similar circumstances, it follows that ordinary care was exercised, unless such custom is so obviously dangerous to life or limb as to be recognized as such by all intelligent people.

Review of Stasek v. Banner Coffee Co.:

1. What was the demand in the action?
2. State the facts briefly.
3. State the question involved.
4. Why did not the statute regulating poisons apply to the facts of this case?
5. Why had the defendant exercised ordinary care?

Readings: Liability of Vendor of Dangerous Articles.

1. Sale of Explosive, Retailer Not Liable. *Clement v. Rommeck* (1907) 149 Mich. 595, 113 N. W. 286, 13 L. R. A. (N. S.) 382, 119 Am. St. Rep. 695.
2. Manufacturer Liable. *Wolcho v. Rosenbluth* (1908) 81 Conn. 358, 71 A. 566, 21 L. R. A. (N. S.) 571.
3. No Warning Given as to Dangerous Character of Article Sold. *Clement v. Crosby & Co.* (1907) 148 Mich. 293, 111 N. W. 745, 10 L. R. A. (N. S.) 588, 12 Ann. Cas. 265.
4. Negligence of the Manufacturer. *Genack v. Gorman* (1923) 224 Mich. 79, 194 N. W. 575.

Eyeglasses—New York Statute Requires Attendance of Physician or Optometrist at Places Where Sold

In New York a statute (Laws 1928, c. 379, § 1432a) was enacted which made it unlawful to sell at retail in any store or established place of business "any spectacles, eyeglasses or lenses for the correcting of vision, unless a duly licensed physician, or duly qualified optometrist, certified under this article, be in charge of and in personal attendance at the booth, counter, or place, where such articles are sold in such store or established place of business." Prior to the passage of this statute, persons were accustomed to select glasses for themselves without examination, and to pay a very small sum for them. In a case which tested the validity of the statute, the court held it to be valid, and stated that obviously much good would be accomplished by the operation of the statute. *Roschen v. Ward* (1929) 279 U. S. 337, 49 S. Ct. 336, 73 L. Ed. 722. See, also, *Roschen v. Ottinger* (D. C.) 29 F.(2d) 762.

Readings: Statutes and Ordinances Regulating Sale of Spectacles, Eyeglasses, or Lenses. Statute Regulating Practice of Optometry Held Unconstitutional. People v. Griffith (1917) 280 Ill. 18, 117 N. E. 195.

CHAPTER 19

MISCELLANEOUS TRANSACTIONS INVOLVING THE DRUGGIST OR HIS BUSINESS

Business Transactions

There are business problems and transactions in no way involving the sale of drugs which most druggists at one time or another must meet. This chapter is an attempt to throw some light on the legal aspects of a number of these situations. Here has been collected information concerning trade secrets (and no profession has them in greater profusion and value), trading stamps, race problem, good will, bankruptcy, slot machines, and others. All these transactions and problems may occur in any business, but, as here treated, they apply especially to the druggist.

Competitor may Secure Trade Secrets

In business, competition is necessarily close, and competitors often fail to follow the principle laid down in the Golden Rule in their dealings with one another. Many acts which are wrong ethically fail to fall within the range of legal redress. The law, however, does take cognizance of certain phases of business dealings in which the bounds of normal competition have been overstepped. This is known as unfair competition. For example, if a person wrongfully induces the employee of a competitor to disclose trade secrets, in violation of his duty, assumed either by contract or imposed by law, it is a case of unfair competition for which there is a remedy. As a usual thing, if trade secrets have been obtained by unlawful means, equity will protect the interests of the injured party. Many courts speak of trade secrets as property, but this is true to only a limited extent. Unless protected by a patent, they are mere ideas, and may be used by any one who has secured possession of them lawfully.

Protection of Trade Secrets

In the business of handling drugs, poisons, and medicines many secret chemical formulas and secret devices for compound-

ing chemicals are perfected and used. In addition to these, there are other trade secrets, such as lists of customers, secret trade information, and secret codes. Any trade secrets which are not patented are not considered as property, and may be used by any one who has honestly gained possession of them. The use of these trade secrets by a third party will be restrained only when such use amounts to an unfair competition or to an unreasonable interference with the owner's right to carry on his business. If a druggist has certain articles and devices which are patentable, it is to his advantage, in order that he may have the exclusive right to their use, to secure patents on them.

Protecting Trade Secrets from Being Discovered

Any one might have a valuable product, manufactured according to his own secret formula or process, enjoying a good sale, but not subject to patent. Will the courts, by injunction, restrain strangers or those under no legal duty to the owner from ascertaining the trade secret by analysis or examination or experiment? The question is answered definitely in a New York case: "When an article manufactured by some secret process, which is not subject to patent, is thrown upon the market, the whole world is at liberty to discover, if it can by any means, what that process is, and when discovery is thus made, to employ it in the manufacture of similar articles. In such a case the inventor's or manufacturer's property in his process is gone." *Eastman Co. v. Reichenbach* (Sup. 1892) 20 N. Y. S. 110.

Employee must Not Disclose Trade Secrets

It is the duty of an employee to be loyal to his employer and not to do anything that will injure the business. In some contracts of employment a stipulation is included that the employee shall not, during his employment nor thereafter, disclose the trade secrets of the business. These contracts, if fairly drawn, will be enforced, and are not considered contracts in restraint of trade. But, even if there is not an express contract, equity will restrain an unlawful disclosure of trade secrets by an employee on the ground that it is a breach of trust and good faith. In addition to a restraining order, equity, in a proper case, may grant damages for injury suffered by the employer.

Disclosure of Trade Secrets in Court

During the trial of a case it is often absolutely necessary to disclose valuable trade secrets. Sometimes these secrets have been reported in detail in the opinion written by the judge in the case and are to be found in the law reports. Of late, however, the judges are avoiding as much as possible the disclosure of such secrets in the opinions written. The tendency in recent years is to protect the owner of valuable secrets as far as can consistently be done even though they have been disclosed in course of the trial. The fact that a person was compelled to disclose his trade secrets in court does not make them public property open to the use of any one, nor does it deprive their owner of his remedy to protect himself from the unlawful use of his secrets by means of injunction.

This question was directly before the court in *Stone v. Goss* (see readings), and was decided as follows: "It has been argued in behalf of the appellants that the disclosure of the complainants' secret, necessarily made during the trial, would render the injunction nugatory. * * * To obviate it as far as possible, the testimony in this case was taken in camera, and care was taken to print only enough copies of this portion of the evidence to supply the members of the court. It has not been found necessary in this opinion to describe the process, and we see no reason why this disclosure to the court necessarily made for the purpose of the case, should deprive the complainants of their right to relief. The defendants were already possessed of the secret, and they cannot now take advantage of a disclosure made in order to secure relief against them. Such a disclosure is no publication to the world, and, although it may endanger the complainants' secret, it does not deprive them of the right to enjoin the defendants from making use of it."

Readings: Trade Secrets.

1. Right to Use Unpatented Medicine Formula. *Chadwick v. Covell* (1890) 151 Mass. 190, 23 N. E. 1068, 6 L. R. A. 839, 21 Am. St. Rep. 442.
2. Trade Secrets Secured by a Consulting Chemist. *H. B. Wiggins Sons' Co. v. Cott-A-Lap Co.* (C. C. 1909) 169 F. 150.
3. Contract of Employee Not to Disclose Secret Formula to Make Medicine. *C. F. Simmons Medicine Co. v. Simmons* (C. C. 1897) 81 F. 163.

4. Disclosure of Trade Secrets to Court. *Stone v. Goss* (1903) 65 N. J. Eq. 756, 55 A. 736, 63 L. R. A. 344, 103 Am. St. Rep. 794.

Trade-Marks

It may be to the advantage of a druggist to have a trade-mark for certain goods he wishes to sell. In order to secure protection in the use of this trade-mark, he may have it registered under both federal statutes and state statutes.

Trade-Marks—Federal

To obtain a federal trade-mark, the owner must be engaged "in commerce with foreign nations, or among the several states, or with Indian tribes." The application for the trade-mark is addressed to the Commissioner of Patents in care of United States Patent Office, Washington, D. C. The fee is \$10, and the period for which the trade-mark is protected is twenty years. There may be a revival or extension of the protection for an additional period of twenty years. The fee in this case is also \$10.

Trade-Marks—State

A person in business in one state only may register his trade-mark in that state under the state statute governing trade-marks. Such a state trade-mark may be secured by filing copies or facsimilies with the Secretary of State, giving the names of persons interested, listing the goods to which it is to be attached, and paying the filing fee, which varies in the different states from \$1 to \$5.

Readings: Trade-Marks. Application, Fees, Registration. United States Code Annotated, Title 15, Sections 81-86.

Protection of Trade-Marks on Patent or Proprietary Medicines

If a trade-mark is infringed, the aggrieved party usually seeks to restrain the unlawful infringement and also to recover damages for the injury suffered. Such redress is usually granted. However, a trade-mark of a medicinal preparation which as-

serts manifest falsehoods or physiological impossibilities will not be thus protected. If the medicine is ineffectual when applied to the disease for which it is an alleged cure, no protection to the trade-mark thereon will be afforded, but, if it will do some good, even though but little, the trade-mark will be guarded from infringement.

No Valuable Medicinal Ingredients

Digest of Case:

Where a proprietary preparation prepared and used largely as a mere beverage was also falsely and fraudulently represented by its manufacturer to contain valuable medicinal ingredients, a court of equity cannot afford protection to any part of its business against infringement of trade-mark or unfair competition. *Moxie Nerve Food Co. of New England v. Modox* (C. C. 1907) 152 F. 493.

Readings: Suits in Equity to Protect Trade-Marks of Medicines.

1. Trade-Mark Not Protected. *Kohler Manufacturing Co. v. Beeshore* (1893) 59 F. 572, 8 C. C. A. 215.
2. Trade-Mark Protected. *Samuel Bros. & Co. v. Hostetter Co.* (1902) 118 F. 257, 55 C. C. A. 111.

Infringement of Trade-Marks and Trade-Name Unfair Competition

It is unfair competition for one person to simulate the name or symbols of another to deceive the public. It constitutes infringement of a trade-mark or name to use on one's goods any name, mark, or device in such a manner that the purchaser of such goods is deceived into believing that they are manufactured or sold by the rightful owner of the trade-mark or name. The essence of the wrong consists in the sale of goods by one person as those of another, thus appropriating to himself the value of the reputation which has been acquired by another for his own merchandise.

It is a question of fact in each case whether a trade-name has been infringed by an apparently competing company. It all depends upon the effect upon the public, especially upon prospective purchasers. In a Kentucky case the judge stated: "A trade name does not have to be identical with that of another

in order to justify a court in denying its use because calculated to produce unfair competition. It is sufficient if it is so similar to the earlier adapted trade name as to make it likely that ordinary and unsuspecting persons—prospective purchasers—would be led to believe it was the same.” *Newport Sand Bank Co. v. Monarch Sand Mining Co.* (1911) 144 Ky. 7, 137 S. W. 784, 34 L. R. A. (N. S.) 1040.

Readings: Infringement by Use of Similar Names.

1. “Coca-Cola” Infringed by “Extract of Coca and Kola.” *Coca-Cola Co. v. American Druggists’ Syndicate* (D. C. 1912) 200 F. 107.
2. “Coca-Cola” was Infringed by Use of “Fletcher’s Coca-Cola.” *Nashville Syrup Co. v. Coca Cola Co.* (C. C. A. 1914) 215 F. 527.
3. “Johann Hoff’s Malt Extract” Infringed by Use of “Hoff’s Malt Extract.” *Hoff v. Tarrant & Co.* (C. C. 1896) 71 F. 163.
4. “White Rock Lithia Water” Infringed by Use of “High Rock Lithia Water.” *National Water Co. v. O’Connell* (C. C. 1908) 159 F. 1001.
5. “Keepclean” Infringed by Use of “Sta-kleen.” *Florence Manufacturing Co. v. J. C. Dowd & Co.* (1910) 178 F. 73, 101 C. C. A. 565.
6. “Cascarets” Infringed by Use of “Castorets.” *Sterling Remedy Co. v. Spermine Medical Co.* (1901) 112 F. 1000, 50 C. C. A. 657.
7. “Roachsault” Infringed by Use of “Roach Salt.” *Barrett Chemical Co. v. Stern* (1900) 56 App. Div. 143, 67 N. Y. S. 595.

Digest of Cases on Trade-Name:

1. Patent Expired. The right to manufacture Castoria according to Pitchers’ patent process or formula having expired, the privilege of manufacturing and selling a product under the name of Castoria is free to the world. It was held that the new manufacturer must clearly identify his goods and not engage in unfair competition nor do anything which will tend to deceive the public and induce it to purchase his goods under the belief that they are the goods it has been accustomed to purchase under the same name. *Centaur Co. v. Neathery* (1898) 91 F. 891, 34 C. C. A. 118.

2. Article Ordered. In a contract for the sale of an article under its patent or other trade-name, there is an undertaking

that the article delivered shall be of the kind ordered, but not that it shall be suitable for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty, though it does not answer his purpose. *Neigenfind v. Singer & Singer Grocery Co.* (1923) 227 Ill. App. 493.

Readings: Infringement of Trade-Names.

1. Similarity of Name as Constituting Infringement of Trade-Name. *Thaddeus Davids Co. v. Cortland I. Davids et al.* (1914) 233 U. S. 461, 34 S. Ct. 648, 58 L. Ed. 1046, Ann. Cas. 1915B, 322.
2. Limitation of Right to Use One's Own Name as His Trade-Name. *Ætna Mill & Elevator Co. v. Kramer Milling Co.* (1910) 82 Kan. 679, 109 P. 692, 28 L. R. A. (N. S.) 934.

Trading Stamps

In some states there are no restrictions on the use of trading stamps in connection with sales, but in other states there are statutory regulations. Occasionally the cash value is required to be printed on each stamp, and the stamp must be redeemed in cash by the one issuing it. In some jurisdictions trading stamp companies are taxed very highly.

Georgia Restricts Use of Trading Stamps

Statute: It shall be a misdemeanor for any person, firm, or corporation to issue or give away in connection with the sale of any article of goods, wares or merchandise any stamp commonly called a trading stamp or other like device, which said stamp or other like device would entitle the holder thereof to receive from some other person or party than the vendor, any indefinite or undescribed thing, the nature or value of which was unknown to the purchaser at the time of the purchase of said article of goods, wares or merchandise. *Park's Ann. Pen. Code* 1914, vol. 6, § 404.

Readings: The Law of Trading Stamps.

1. Use of Trading Stamps is Lawful. *Ex parte J. C. Holland* (1905) 147 Cal. 763, 82 P. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878.

2. **Municipal Ordinance Prohibiting Trading Stamps.** City & County of Denver v. Frueauff (1906) 39 Colo. 20, 88 P. 389, 7 L. R. A. (N. S.) 1131, 12 Ann. Cas. 521.
3. **Constitutionality of Trading Stamp Statutes.** State of Utah v. Holtgreve (1921) 58 Utah, 563, 200 P. 894, 26 A. L. R. 696.

Race, Color, Previous Condition of Servitude—National Provisions

When the Thirteenth Amendment to the Constitution of the United States was passed, it abolished slavery, and this utterly changed the status of the negro. Then followed the Fourteenth Amendment, which provided that "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

State Constitutional Provisions

Most states do not make any provision in their Constitutions in regard to discrimination as to the rights, privileges, and immunities on account of race, color, or previous condition of servitude, relying on the provisions of the United States Constitution. However, a few states do embody some such provisions in their Constitutions.

State Statutes

In many of the states there are statutes called "Civil Rights Acts," designated to protect all citizens of the state in the equal enjoyment and privileges of inns, restaurants, eating houses, public conveyances, theaters, and other places of public accommodation or amusement. Whether there are state constitutional provisions or merely statutory regulation, a large amount of litigation has arisen in relation to this subject. Most of the trouble has arisen through discrimination because of race or color, by innkeepers, or in connection with schools, theaters, restaurants, soda fountains, street cars, and railroads.

The Soda Fountain Color Problem

Does the druggist become liable for the refusal, solely on the ground of color, to serve ice cream or drinks at his soda fountain? This usually must be determined by the state statute on "Civil Rights." In at least one state the druggist was held liable for such discrimination, while courts in several other states have held the opposite view. The state statutes when passed made no direct reference to soda fountains and places where ice cream is served, so the difficulty arises in determining whether this line of business is included in the general terms of the statute. In many states the statutes enumerate certain places, as inns, theaters, restaurants, eating houses, barber shops, bathhouses, carriers. Then there are some general phrases used, as "all other places of public accommodation," "all other places of amusement," "all other places where refreshments are served," "all places of business for which a license is required." At least one statute, that of Minnesota, includes ice cream parlors in its list. The general phrases are the ones which cause the trouble in deciding just what places these terms really include. Since the law on this point is so unsettled, and since the statutes are so different, a druggist should know the law of his state very definitely, if he wishes not to serve ice cream solely on the ground of the color of the customer.

Refusing to Serve Ice Cream on Account of Race or Color

Case:

HUTSON v. OWL DRUG CO.

District Court of Appeal, First District, Division 1, California, 1926.
79 Cal. App. 390, 249 P. 524.

Action by Lela Hutson and Britt Hutson against the Owl Drug Company. Judgment for plaintiffs and defendant appeals.

The court found: That the plaintiff was at the time alleged an American citizen and a negro. That she entered the establishment of defendant corporation, and took her place at the soda fountain, where the general public is served with food and drinks, and gave her order to one Mr. Tucker, who was then one of the employees of defendant corporation, then acting in the regular course of his employment, assisting about and in dispensing food and drinks for defendant corporation. That said employee Tucker did refuse to serve plaintiff Lela Hutson. That,

after waiting about twenty minutes, another employee served her with her order, but placed same among dirty dishes on the counter. That said employee Tucker remarked in a loud voice: "What did you serve the nigger for? I wouldn't have served her; she could have set there till tomorrow." That thereafter the said employee Tucker hit the plaintiff on the face and threw a cup of coffee on her. That he struck her a severe blow on the jaw and hit her on the breast with a cup of coffee. That at the time of the aforesaid occurrence there was a large number of people in the store. That plaintiff suffered great humiliation and embarrassment and received painful injuries to her cheek and jaw. That she was not accorded full accommodations, advantages, facilities, and privileges applicable alike to and given by defendant corporation to persons of the white race.

Question: Was the claim for damages based solely on the refusal of accommodations, or were there other elements of damage?

CAMPBELL, J. As conclusion of law, the court concludes that plaintiffs are entitled to recover of and from defendant damages in the sum of \$500.

The transcript of the testimony is not before us, but from the fact that the court has not found upon the question whether or not the acts constituting the assault were within the scope of the employee's authority, or, if not within the scope of his authority, whether the assault was acquiesced in by appellant, which facts are alleged in the complaint and denied in the answer, we conclude that the action was tried on the one issue, and that the damages allowed were allowed as damages sustained because respondent was not accorded the same accommodations, advantages, facilities and privileges, applicable alike to persons of the white race.

While it is often difficult, as will be found from a review of the decisions in re violation of civil rights, to show that the complainant was denied full accommodations simply and solely on account of complainant's race or color, the finding in this instance is direct and certain and clearly answers the assignment of error set forth in specification two.

Review of Hutson v. Owl Drug Co.:

1. State briefly the facts.
2. State the question involved.

3. Why was it important that the claim was based solely on the refusal of accommodations?
4. Why was it material that the assault was accomplished in the scope of the employment of the employee?
5. How is the phrase "civil rights" used?
6. State the decision of the case.

Refusal to Sell Soft Drinks to Negroes

Case:

GOFF v. SAVAGE.

Supreme Court of Washington, 1922. 122 Wash. 194, 210 P. 374.

An action for damages, alleging that the defendant had refused to sell to plaintiff a soft drink at a soda fountain, for the reason that plaintiff is a negro. The statute is section 2686, Rem. Code 1915, which reads as follows: "Every person who shall deny to any other person because of race, creed or color, the full enjoyment of any of the accommodations, advantages, facilities or privileges of any place of public resort, accommodation, assemblage, or amusement, shall be guilty of a misdemeanor."

Question: Does this statute preclude a drug store proprietor from refusing to sell a soft drink at his fountain to a negro?

Hovey, J. The only subdivision of this section which can be applicable here would be "accommodation," and whether the sale of soda water is a matter of public accommodation is the question presented for our consideration. The respondent in the present case operated a drug store and in connection therewith an ice cream stand and soda fountain, and he made it a rule of his business not to serve negroes. Statutes of this character have been passed in many states and there are a large number of decisions. * * *

Most of the cases where recovery has been sustained have been cases where the business was clearly of a public character, such as theaters, race tracks, roller skating rinks, inns, and hotels. A well-considered case where the distinction is made between public and private business is that of *Brown v. J. H. Bell Co.*, 146 Iowa, 89, 123 N. W. 231, 124 N. W. 901, 27 L. R. A. (N. S.) 407, Ann. Cas. 1912B, 852.

In *Chochos v. Burden*, 74 Ind. App. 242, 128 N. E. 696, it was held that an ice cream parlor was not an eating house within such

a statute. In our opinion there is a further distinction between the position of one who buys an admission ticket or pays a fixed entrance price into a place commonly accepted as public, and one who enters a place of trade to which the public generally are invited but whose subsequent treatment is dependent upon the mutual agreement between the proprietor or the one conducting the place and the customer. In the latter case the extent of the dealings and the nature of the same, whether upon credit or for cash, or whether in fact any dealing is to be had or not, are a matter of subsequent agreement in the same sense that a prospective patient visits a doctor's office or a client the office of an attorney. The element of discretion on the part of the one who is to part with his goods or his professional services is reserved until a contract is entered into. This distinction is suggested in *People v. Thompson*, 283 Ill. 87, 119 N. E. 41, L. R. A. 1918D, 382. In our opinion the statute was never intended to apply to the business in question and the statute, being penal in its character, should be strictly construed.

Review of Goff v. Savage:

1. What was the object of the action?
2. To what extent is the statute indefinite?
3. What question was presented for consideration?
4. When is a business clearly of a public character?
5. Why was this statute not intended to apply to this situation?
6. Do you consider this a pretty close case?
7. Was there anything involved in the case except the simple refusal to serve the ice cream to the plaintiff?

Readings: Refusing Service because of Race, Color, or Previous Condition of Servitude. The defense that the restaurant was out of food is frivolous. *Wilson v. Razzetti* (1914) 88 Misc. 37, 150 N. Y. S. 145.

Digest of Cases on Civil Rights:

1. Saloon. In Ohio a saloon was held not to come within the phrase "and all other places of public accommodation and amusement." *Kellar v. Koerber*, 61 Ohio St. 388, 55 N. E. 1002.
2. Drug Store and Soda Fountain. In Illinois the statute was held not to include a drug store or the soda fountain therein from which refreshing drinks were dispensed. *Cecil v. Green*, 161 Ill. 265, 43 N. E. 1105, 32 L. R. A. 566.

3. Barber Shop. In Connecticut a barber shop was held not to be a place of public accommodation within the meaning of the Civil Rights Act. *Faulkner v. Solazzi*, 79 Conn. 541, 65 A. 947, 9 L. R. A. (N. S.) 601, 9 Ann. Cas. 67.

4. Liquor Saloon. In New York a liquor saloon is not within the operation of the Civil Rights Act, entitling all persons to equal accommodations, advantages, and privileges. *Gibbs v. Arras Brothers*, 222 N. Y. 332, 118 N. E. 857, L. R. A. 1918F, 826, Ann. Cas. 1918D, 1141.

5. Bootblacking Stand. In Colorado a bootblacking stand is a place of public accommodation within the meaning of a statute imposing a penalty for refusal of accommodations. *Darius v. Apostolos* (1919) 68 Colo. 323, 190 P. 510, 10 A. L. R. 986.

Newspaper Notices Concerning Unpaid Debts

Newspaper publicity concerning debtors and unpaid debts is a dangerous thing. In most states, if the statements are untrue, they are libelous. This rule has special application to a business man or one to whom credit is a valuable asset, particularly if the printed article imputes insolvency or want of credit. In some states using various publication devices as a means of collecting money has been made a criminal offense.

Occupation Tax

In some places an occupation tax exists, imposed either by the city or the state. It is a sum of money paid merely for the privilege of doing business. This tax is in addition to property taxes, and, in the case of a druggist, to any sum paid to the state board of pharmacy for a certificate to practice pharmacy.

Insolvency and Bankruptcy

Sometimes a business man finds that he has reached the end of his resources and is at a loss to know how to proceed. If insolvent, he may attempt to secure a composition with his creditors, by which all the creditors agree to share pro rata and in return execute a discharge of the debtor. The debtor must deal honestly and fairly with all his creditors, allowing each the same percentage, or the composition will be set aside. Or the debtor may make a general assignment of all his property to a trustee to hold and distribute for the benefit of all the creditors. If neither

of these methods is practicable, the debtor may take advantage of the national bankruptcy laws. There are two forms of bankruptcy—voluntary and involuntary. If a debtor of his own accord files a petition of bankruptcy, it is the former, but, if creditors force the proceeding, it is the latter. In times of financial distress, banks, railroads, and insurance companies do not go through bankruptcy proceedings, but are handled by receivers of conservators. Farmers and wage-earners cannot be forced through bankruptcy, but may take advantage of voluntary bankruptcy.

Procedure in Bankruptcy

If a merchant is insolvent, he may go through voluntary bankruptcy no matter how small his indebtedness is. He files a petition in the United States District Court stating his insolvency and his debts and assets. In involuntary bankruptcy, three or more creditors having claims amounting to \$500 or more petition the United States District Court showing their claims, also stating that the debtor has committed some act of bankruptcy and that he owes \$1,000 or more. All property and claims must be accurately listed. Some years ago, a young business man planned on voluntary bankruptcy, but, when he learned that the cash surrender value of his life insurance had to be listed, he changed his mind, renewed his energy in business, and is succeeding today.

Readings: Bankruptcy Proceedings.

1. Instituting Bankruptcy Proceedings against One Not Subject Thereto. *T. E. Hill Co. v. Contractors' Supply & Equipment Co.* (1911) 249 Ill. 304, 94 N. E. 544, 34 L. R. A. (N. S.) 456.
2. Voluntary Bankruptcy. *In re Schwaninger* (D. C. 1906) 144 F. 555, 16 A. B. R. 427.

Ordinance Imposing License Fee on Soda Fountain Operators

"The city ordinance required each keeper or proprietor of a soda fountain to pay an annual license fee of \$30. The vocation of selling soda water and soft drinks is a proper subject for police regulation because it affects the public health and welfare generally. It is a matter of common knowledge that impure milk and uncleanness generally, if permitted at public drink-

ing fountains, would be a fruitful source of disease, and it needs no discussion to show that the business is one that particularly falls within the power of the state and municipalities to regulate upon the same principle as a meat market or restaurant." *Kirby v. City of Paragould* (1923) 159 Ark. 29, 251 S. W. 374.

Unpaid Taxes

It is important that the owner of a drug store, or of any other business for that matter, should know what is expected of him concerning the payment of taxes. Both real and personal property are taxed, and, by statute, the tax becomes a lien upon the property. This lien on the real property attaches to the specific property against which it was assessed. The lien upon personal property is not so limited to the particular articles assessed, but may be enforced against all the property which was owned by the individual or firm at the time of the assessment. A property tax takes preference over all other liens and prior mortgages. A sale of the property does not affect the tax lien. Before purchasing any property, the question of unpaid taxes should be ascertained.

Use of United States Flag or Emblem for Advertising Purposes

In all the states of the Union, with the exception of Virginia and Kentucky, there are statutes defining what constitutes flag desecration. The general idea is that the use of the flag for advertising purposes constitutes flag desecration. Some statutes prohibit very definitely the placing of any word, figure, mark, picture, design, drawing, or any other advertisement of any nature whatsoever, upon any flag, standard, color, ensign, or shield of the United States, or upon the state flag. In addition, any one who exposes such advertising, or keeps it for sale or for gratuitous distribution, is subject to prosecution. In some states there are statutes prohibiting the use of a representation of the flag upon any package or container. The usual penalty for flag desecration is from \$10 to \$1,000 and imprisonment for thirty days. A prosecution may be brought by any one in the name of the people of the state.

False Advertising Made Unlawful by Statute

Practically every state by statute prohibits false advertising. The statutes prohibit persons, firms, corporations, associations, agents, or employees from using newspapers, handbills, posters, circulars, pamphlets, letters, books, or other publications for the dissemination of advertising in any manner false or misleading. Because drugs, medical preparations, and patent nostrums are mentioned in the Oregon statute, it is given here.

False Advertising—False, Deceptive or Misleading Representations Forbidden

Statute: It shall be unlawful for any person, firm, corporation or association, with intent to sell or dispose of any real estate, merchandise, foods, drugs, medicinal preparations or other patent nostrums, securities, services or anything offered by such person, firm, corporation or association, directly or indirectly, to the public for sale or distribution, or with the intent to increase the consumption thereof, or to induce the public in any manner to enter into any obligation relating thereto, or to acquire title thereto, or an interest therein, to make, publish, disseminate, circulate, or place before the public, or cause directly or indirectly, to be made, published, disseminated, circulated, or placed before the public within the state of Oregon, in a newspaper or other publication, or in the form of a book, notice, handbill, sign, poster, bill, circular, pamphlet, tag, letter or contrivance or in any other way or manner whatsoever, an advertisement of any sort regarding merchandise, securities, services, or anything so offered to the public, which advertisement contains any assertion, representation or statement of fact which is untrue, deceptive or misleading. Or. L. 1920, § 2233.

Readings: False Advertising Statutes.

1. That Compound Gave Greater Power to Gasoline. Commonwealth v. Reilly (1924) 248 Mass. 1, 142 N. E. 915.
2. Advertising Former Market Price of an Article is Not False Advertising under the Washington Statute. State v. Massey (1917) 95 Wash. 1, 163 P. 7.

Slot Machines as Gambling Devices

The consensus of legal opinion is that operating a slot machine constitutes gambling. Gambling has been defined as staking money upon an uncertain event. It may be that but small amounts are hazarded on the chance of winning larger sums or articles of greater value. This is usually true of the slot machine. Operating a slot machine is gambling, though the operator gets a stated sum or given package in addition to his chance, though the machine indicates before each operation what the prize will be, even though prizes are distributed in a regular order. It has been held that any scheme for the distribution of prizes constitutes gambling, though there are no blanks.

Readings: Slot Machines as Gambling.

1. A Chewing Gum Vending Machine. *Queen v. State* (1922) 93 Tex. Cr. R. 173, 246 S. W. 384.
2. Machine Indicated in Advance Just What the Prize Would Be. *Almy Manufacturing Co. v. City of Chicago* (1916) 202 Ill. App. 240.
3. Slot Machine as a Gambling Device. *Territory of New Mexico v. Jones* (1908) 14 N. M. 579, 99 P. 338, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128.

Libel—False Publication of Statement that Druggist Recommended Patent Medicine

Case:

McGREGOR v. STATE CO.

Supreme Court of South Carolina, 1920. 114 S. C. 48, 103 S. E. 84.

Action for libel. One of the defendants, the Irogen Chemical Company, was the manufacturer of a patent medicine called "Irogen," said to contain "essential elements of red blood corpuscles." On March 20, 1918, and on March 24, 1918, there appeared in the state newspaper an unsigned display print and voluminous advertisement of this medicine, a few lines of which are here given:

"Scientists Discover Nation's Secret of Regenerating Blood and Vital Powers."

"World's Greatest Authorities Demonstrate Irogen is True Blood Builder."

"Druggists Tell How Irogen Invigorates."

"Greatest Strength Builder Known to Medical World."

The drug stores named in the advertisements as the distributors of the medicine included the plaintiff and twenty-three others.

Question: Was it a libel to publish the false statement that a retail druggist's statement indorsed the patent medicine?

GAGE, J. [Not libelous.] It is true that the publication tended to represent the plaintiff as holding himself out as an endorser and sponsor for a patent medicine, and that the publication was calculated to induce the public to believe he was endorsing and recommending a patent medicine. But it is not reasonably true from the complaint that the publication was calculated to injure the plaintiff in his business reputation and standing. * * *

If the plaintiff was published as an endorser of Irogen, nothing else appearing and nothing else does appear, there is no reasonable inference to be drawn therefrom, that his reputation was thereby impeached, or that his business was thereby injured. Indeed, it was stated at the bar that the plaintiff in fact had two bottles of the concoction on his shelves.

It is common knowledge that patent medicines are sold by many respectable druggists; and to hold that such a practice, nothing more appearing, is disreputable or hurtful, would be a non sequitur and a dictum.

Review of McGregor v. State Co.:

1. What was the purpose of the action?
2. What claims were made for the medicine?
3. Why was it not a libel to publish without authority the statement that the plaintiff as a druggist indorsed the patent medicine?
4. Why would such an advertisement not injure a druggist?
5. Do most druggists carry in stock some patent medicines?
6. Did the plaintiff plead or prove the fact that he had suffered any special damage?

Slander by a Druggist—Commenting on Physician's Prescription

Case:

TARLETON v. LAGARDE.

Supreme Court of Louisiana, 1894. 46 La. Ann. 1368, 16 So. 180,
26 L. R. A. 325, 49 Am. St. Rep. 353.

The plaintiff, a physician, claims of the defendant, a druggist, damages for his refusal to fill plaintiff's prescriptions and for slander. The defense is inability to fill the prescription and a denial of the slander.

The slander attributed in the petition to defendant was in the course of a discussion between himself and one of his fellow citizens, begun on the street and continued in a barber shop. It commenced with a request of defendant for information of the gentleman addressed, formerly a representative in the legislature from defendant's parish, whether the laws compelled a druggist to fill prescriptions presented to him. The information given on that subject did not suit defendant, seems to have excited him and led him to make observations offensive and unjust to plaintiff, at least in their tendency to affect those who were gathered by the animated and angry discussion, or to whom the observation might be repeated. The defendant, exercising his privilege of declining to fill plaintiff's prescriptions, should for that very reason have abstained from any comments calculated to convey impressions damaging to plaintiff's character as a professional man. On the contrary, defendant engages in a public discussion on the subject of plaintiff's prescriptions, in which he derided plaintiff's diploma, i. e., he (defendant) would not give a straw for such a diploma; and he further commented on one of plaintiff's prescriptions as containing ingredients that might kill the child. It is proof that plaintiff is a graduate of Tulane University, Medical Department, and that he is a practicing physician.

Question: Is it slander for a druggist, without cause, to indulge in public expressions tending to create the impression that a physician is incompetent and that his diploma is not worth a straw?

MILLER, J. There is no testimony to justify the defendant's comments on plaintiff's prescription, and there is, if possible, still less extenuation for defendant's disparaging allusions to plaintiff's diploma. * * *

The application of defendant's remarks was well understood. They were uttered publicly. Their natural tendency to affect plaintiff injuriously as a professional man is obvious, and the mischief apt to be done by such language is increased when it is considered that defendant is a druggist in the community in which plaintiff is a practicing physician. We have read with care the elaborate opinion of the judge of the lower court. We think that, under the circumstances, the judgment should be more than nominal. The case is an assault without semblance of cause on professional reputation. In our opinion, the judgment should be increased to \$100.

Review of Tarleton v. Lagarde:

1. What slander was attributed to the defendant?
2. Why should a druggist not make any public comments about a physician's prescription?
3. Why is it dangerous to comment on the qualifications of a professional man?
4. Is any liability assumed by merely refusing to fill a prescription?
5. What constitutes slander?

Libel Defined

Chancellor Kent in his commentaries formulated a definition for libel which has been often quoted, viz.: "A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead or the reputation of one who is alive, and expose him to public hatred, contempt, or ridicule."

Slander Defined

Slander was outlined in *Pollard v. Lyon* (see readings) as follows: "Words falsely spoken of a person which impute to the party the commission of some criminal offense involving moral turpitude, for which the party, if the charge be true, may be indicted and punished; (2) words falsely spoken of a person which impute that the person is infected with some contagious disease, where, if the charge were true, it should exclude the party from society; (3) defamatory words falsely spoken of a person, which impute to the party unfitness to perform the duties of an office or employment of profit or the want of integrity

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in the discharge of such office or employment; (4) defamatory words falsely spoken of a party, which prejudice such party in his profession or trade; (5) defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion the party special damage."

Readings: Libel and Slander.

1. Outline of Slanderous Words. *Pollard v. Lyon* (1875) 91 U. S. 225, 23 L. Ed. 308.
2. False Publication that Druggist Recommended Patent Medicine. *McGregor v. State* (1920) 114 S. C. 48, 103 S. E. 84.
3. Imputation of Ignorance, Incompetence, etc., to Druggist, Physician, or Dentist as Slander or Libel. *Rood v. Dutcher et al.* (1909) 23 S. D. 70, 120 N. W. 772, 20 Ann. Cas. 480.

Drug Business Restricted by the Lease

There are many restrictions and laws controlling the drug business, but a man may restrict it further, if he wishes, by contracts expressed or implied. In a Chicago case a druggist restricted his business by the provisions in the lease to his building. The lease granted the use of the premises for a drug store and for no other purpose whatsoever, and the lessee covenanted not to sell edibles on the premises that would in any way conflict with the exclusive right granted to another tenant operating a restaurant on the premises, and also not to do any cooking on the premises. Of course, these covenants bound the lessee for the full term of his lease, though the lease on the restaurant expired first, and though it became the custom of many drug stores in the loop district to serve meals. *First Trust & Savings Bank, Trustee, v. Economical Drug Co.* (1928) 250 Ill. App. 112.

CHAPTER 20

MEASURE OF COMPENSATION FOR INJURIES

Damages

The word "damages," as used in a legal sense, means a sum of money which the law allows as compensation for a loss or injury suffered or incurred. This loss or injury may have been brought about by negligence, by accident, or by design of the offending party. Damages in varying degrees may be allowed, but the principle of compensation is always observed. What is known as actual or compensatory damages means merely a pecuniary equivalent of the injury suffered.

Damages for Injury Caused by Negligence of Druggist

There is no fixed rule by which to measure the damages for personal injuries suffered by reason of the negligence of a druggist in preparing a prescription. In some cases, it has been held to extend to reasonable cost of medicine, medical attendance, and cost of care of patient made necessary by the injury inflicted. In case of death it may include funeral expenses, and, if a member of the family, loss of services.

Sometimes a plaintiff demands more than mere compensation for the injury suffered. Such additional sum is usually classed as punitive, exemplary, or vindictive damages, and is claimed on account of the malicious, wanton, or oppressive character of the injury done. To secure such damages there must be aggravating circumstances, such as willfulness, wantonness, gross negligence, or gross fraud on the part of the offender. In a few cases the phrase "Cosmetic damages" has been used to designate money awarded for personal disfigurement. In liquidated damages, the sum is readily ascertained from the transaction involved, while in unliquidated damages the amount is an uncertain quantity. In nominal damages a small sum only is awarded. This merely establishes a right, but brings nothing as compensation.

Damages Recoverable for Loss of Life

The measure of recovery for the negligent killing of a person has been stated to be "a fair equivalent in money for the power

of the decedent to earn money lost by reason of the destruction of his life, not exceeding the amount sued for, or the maximum amount allowed by statute, and in fixing the damages the jury should be instructed to take into consideration the age of the decedent at the time of his death, his earning capacity, and the probable duration of his life."

Damages Awarded

Digest of Cases:

1. The Sum of \$10,000 was Reasonable Compensation. In an action for injuries resulting from the taking of pure salicylate negligently substituted in a prescription by the defendant drug company, held, that a verdict of \$20,000 was excessive and that \$10,000 would be a reasonable compensation to the plaintiff. *Jones v. Walgreen Co.* (1932) 265 Ill. App. 308.

2. A verdict of \$2,500 was held not excessive, where plaintiff had been made sick by drinking Coca-Cola from a bottle which contained part of a decomposed mouse or rat. *Coca-Cola Bottling Co. v. Barksdale* (1920) 17 Ala. App. 606, 88 So. 36.

3. A verdict against dealers in oil for \$7,500 for death of plaintiff's wife, when gasoline purchased as kerosene exploded as she attempted to light a fire, was held not to be excessive. *Kearse v. Seyb* (1919) 200 Mo. App. 645, 209 S. W. 635.

4. Sickness of a child was caused by druggist's clerk negligently placing calomel in a prescription not calling for it. Held, that druggist would be liable for reasonable expense of nursing and medical treatment and for the value of parent's services while nursing, and a recovery of \$175 by the mother was not excessive. *McGahey v. Albritton* (1926) 214 Ala. 279, 107 So. 751.

Readings: Damages Incurred in Relation to Drugs, Foods, or Poisons.

1. Damages for Death of a Child. *Smith's Adm'x v. Middleton* (1902) 112 Ky. 588, 66 S. W. 388, 56 L. R. A. 484, 99 Am. St. Rep. 308.
2. Druggist Liable in Damages for Injury Caused by Negligence of Clerk. *Goodwin v. Rowe* (1913) 67 Or. 1, 135 P. 171, Ann. Cas. 1915C, 416.
3. In Exceptional Cases Druggist may be Liable for Punitive Damages. *Ohio County Drug Co. v. Howard* (1923) 201 Ky. 346, 256 S. W. 705, 31 A. L. R. 1355.

Damages Not Mitigated by Life Insurance

In an action to recover damages for wrongful death, the defendant is not entitled to show in mitigation of damages that the plaintiff has received the life insurance carried on the life of the deceased. In a recent case the plaintiff sued to recover damages for the wrongful death of his wife caused by oil of tansy poisoning. It was held, in accordance with the rule, that evidence that the deceased carried life insurance should be excluded from the trial. *Lynn v. Hewit Pharmacies, Inc.* (1931) 234 App. Div. 805, 254 N. Y. S. 9.

Amount of Damages Awarded for Death of Druggist Due to Negligence

Case:

HEXAMER v. PUBLIC SERVICE RY. CO.

Supreme Court of New Jersey, 1926. 132 A. 310, 4 N. J. Misc. 184.

The complainant's decedent was killed by a west-bound trolley car on November 20, 1922, at the defendant's elevated station in Hoboken. There was a verdict for the plaintiff for \$10,500. The action was for negligence in maintaining a defective platform and also for negligently operating its trolley cars.

Question: Was a verdict of \$10,500 for the death of a 54 year old druggist excessive?

PER CURIAM. The first reason presented for a new trial is that the damages are excessive. The deceased was 54 years old at the time of his death. He was a druggist. His widow was 57. He carried on a drug business for 7 years for his own profit. He earned about \$45 a day. He allowed his wife \$20 a week for the table; furnished her with clothes and other things that she required. He occupied apartments for which he paid \$65 a month. After his death the widow sold the store for \$6,500. There was also proof that the clear profit of her husband was \$25 a day.

We cannot say in view of the evidence as to the husband's business capacity and his earnings and his future prospect of greater prosperity based upon his past business career, his thrift, his generous conduct toward his wife, he being 54 and she 57

years of age at the time of his death, that the award of the sum of \$10,500 is excessive in that the jury speculated wrongly in arriving at that figure, or that the verdict was clearly the result of mistake, passion, partiality or prejudice on the part of the jury. The reasonable expectation of the life of the husband and the reasonable expectation of the life of the wife, and the probable prospective pecuniary benefits she would have derived from him if he had continued in life, while partly of a speculative character, was an element pre-eminently for a jury to pass upon, and with the evidence before us, we think a proper result was reached.

Review of Hexamer v. Public Service Ry. Co.:

1. State the important facts.
2. What sum was recovered?
3. State the question of the case.
4. What reasons were given by the court that the damages were not excessive?

Damages for Death of Druggist Engaged in Other Employment

In awarding damages for the death of a person, the courts take cognizance of the earning capacity of the deceased. If he was a druggist working at his profession at the time of his death, it is not difficult to estimate his producing value. But if he was engaged in some other business, possibly earning a smaller wage, should the measure of damages be awarded according to what he was actually earning at the time of his death, or in accordance with what would normally be his earning capacity if practicing the profession for which he was educated? In a case in which a wife received an award of \$5,000 for the death of her husband, a druggist at the time of his death otherwise employed, an appeal was taken. The court said: "It is urged that the judgment in favor of the wife of the deceased for \$5,000 is excessive. The deceased was 31 years old at the time of his death, was sober and industrious, and of good physical condition for some time before he received the injury, but there was evidence tending to show that at some former period he may have been intemperate in his habits, from which some estrangement may have arisen between him and his wife. He was a druggist by profession, although at the time of his death engaged in other business under contract with those persons who had undertaken to grade the

road and thereon lay the rails for the company, and for his services therein he was receiving \$2.50 per day. We are not prepared to say that the judgment under the facts is excessive." *Dallas & Wichita Railway Co. v. Spicker*, 61 Tex. 427, 48 Am. Rep. 297.

Damages—Mental Suffering

It is interesting to note to what extent fear, shock, or mental suffering caused by the discovery that one has swallowed particles of ground glass in food, beverages, or medicines are taken into account in awarding damages. Particularly in the case of one already seriously ill, the knowledge that ground glass was in medicine taken must cause acute nervous strain. The following case shows that fear alone and not accompanied by any other injury is not taken into consideration in granting damages, and illustrates the treatment this subject has generally received by the courts:

Damages for Mental Suffering—Ground Glass in Medicine

In a recent Connecticut case, *Jones v. Damtoft* (1929) 109 Conn. 350, 146 A. 490, the plaintiff had taken medicine purchased at the store of the defendant, and claimed to have been injured by minute chips and flakes of glass in considerable quantities contained therein. It was contended that the glass cut the throat, that the discovery and the possibility that the plaintiff had swallowed a considerable quantity of broken glass caused a nervous shock and a return of the inflammatory condition, and that as a result he suffered great pain and mental anguish. The first two claims were not established, and on the third point the court said: "The question presented by this record is thus reduced to the simple one, whether recovery can be had for negligence resulting in fright or shock without physical injury. We are not asked to consider this question, for the plaintiff claims damages only on the ground that he suffered resulting physical injury, and says: 'This is not an action for damages for fear, fright or other mental disturbances, for which, standing alone, it is admitted there can be no recovery.'" Then, when the only injury is fear, fright, or other mental suffering, there can be no recovery in damages. Mental anguish, unaccompanied by other injury, is not grounds for recovery of damages. If there has been a physical injury, caused by the negligence of the defend-

ant, then fear, fright, and other mental disturbances may be taken into consideration in estimating the damages suffered.

Readings: Mental Anguish as an Element of Damages.

1. Where Proprietor of Store Accuses Customer of Theft.
Lonergan v. Small (1909) 81 Kan. 48, 105 P. 27, 25 L. R. A. (N. S.) 976.
2. Liability of Seller for Injuries Resulting from Fright
"Without any Contemporaneous Physical Injury." 3 U. Cin. Law Rev. 481, 482.

Total Disability

The interpretation of the phrase "total disability" in insurance policies has caused much litigation in recent years. A great variety of policies have been written in which the wording of the clauses has differed greatly. The type of employment in which the insured is engaged makes a great difference when it is necessary to apply the phrase to each particular situation. It has been decided many times that the insured was not totally disabled if his earning power was not totally destroyed and if he is still able to perform remunerative employment. Under a holding of this type, it is also held to be the duty of the insured to secure such work as he is still able to perform. It is very evident from the cases that the average person considers that he has more protection under his policy than it actually affords.

Total Disability in an Insurance Policy as Applied to a Druggist

Case:

SMITH v. SUPREME LODGE OF ORDER OF SELECT FRIENDS.

Supreme Court of Kansas, 1900. 62 Kan. 75, 61 P. 416.

Irvin Smith brought an action against the Supreme Lodge of the Order of Select Friends to recover \$3,000 upon an insurance contract. The constitution and general laws provide for the payment of a benefit for disability whenever a member, by reason of disease, accident, or otherwise, while engaged in the performance of any reputable or legitimate business or recreation, becomes totally and permanently disabled from following his

usual or regular business, occupation, or profession. One section of the general law provides that: "The following, among other things, are hereby declared to be total and permanent disabilities, within the meaning of the laws of this order: The loss of both eyes; the loss of one hand and permanent crippling of the other; the loss of one foot and permanent crippling of the other leg or foot." The plaintiff was a pharmacist, and on December 4, 1897, he suffered an accidental gunshot wound in his left hand, and it became necessary to amputate the arm at the shoulder joint. The right hand was not injured, nor was any other injury sustained, but the plaintiff alleged and claimed that the loss of the left hand constituted a permanent and total disability within the terms of the contract, and claimed a recovery of \$3,000.

Question: Did this injury constitute a total disability under the druggist's insurance contract?

JOHNSTONE, J. While the loss of an arm and hand is a serious one, it cannot be held to be a total disability. It is a matter of common knowledge that much, if not all, of the work and business of a druggist can be fairly well done by one who has lost a hand. He will not be able to compound medicines so conveniently and expeditiously as a person who has both hands, but a large proportion of the medicines sold in a drug store today are compounded and ready for sale before they reach the hands of the retail dealer. It is equally well known that a large proportion of the business of the ordinary drug store consists in the sale of medical stores and instruments, toilet articles, holiday goods, cigars, soda and mineral waters, etc.; and since all know that this, if not all, the work of a druggist may be done, and the business conducted, with reasonable efficiency, by a person who has lost a hand. To sustain his claim, the plaintiff must show more than a partial disability; that is, a complete disability to carry on the business of a druggist. This view is strengthened by that provision of the law of the order declaring what shall constitute a total and permanent disability. It specifically refers to such a loss as was sustained in this case, and provides that the loss of one hand and the permanent crippling of the other shall be deemed a total and permanent disability within the meaning of the law. This definition and declaration as to what shall constitute a total disability is a part of the contract, and binding upon both of the parties. Whether an injury constitutes a total disability is ordinarily a question for the jury, but from the facts

alleged here, and the well-known requirements of the plaintiff's occupation, it is clear that the plaintiff is not totally and permanently disabled from carrying it on. To so hold would be to alter the contract which has been made between the parties, and to enlarge the liability of one of them beyond that which had been agreed upon.

Review of Smith v. Supreme Lodge of Order of Select Friends:

1. Why did Smith bring the action?
2. Give the material facts.
3. State the question before the court.
4. Why was the druggist not totally disabled?
5. Why could the plaintiff not recover for the partial disability?
6. How did the law of the order define total disability?

Insurance—Injured by Accidental Means—Drinking Wood Alcohol

The insured, within the space of less than an hour, took two drinks of about one ounce each of what he thought was Scotch whisky, but, without his knowledge, he in fact drank a liquid in which there was methyl or wood alcohol, which is a poison. He was injured and lost many months' work. The insured recovered \$3,400 for his injuries; the court saying that, where the insured intends to swallow what he does swallow, but is ignorant of the fact that it contains poison, and loss results therefrom, a recovery can be had upon a policy of insurance which indemnifies against loss by accidental means. *McNally v. Maryland Casualty Co.* (1931) 162 Wash. 321, 298 P. 721, and 16 Minn. Law Rev. 109.

Insurance—Death by Accidental Means—Drinking Wood Alcohol

The insured died as the result of drinking wood alcohol contained in gin cocktails served to him by a friend. The insured had recently become engaged, and with his fiancée was invited to attend a week-end party. His friend purchased what he thought was grain alcohol, and, with the addition of other ingredients, prepared synthetic gin cocktails, which were freely imbibed, and resulted fatally to insured. The beverage which they had been drinking was analyzed and found to contain wood alcohol, and

that his death was caused by the poison contained in wood alcohol. The policy sued on insured against loss of life "resulting from bodily injuries * * * through accidental means." Circuit Judge Parker declared: "We think there can be no question that the death of insured resulted from accidental means within the meaning of the policy. Insured intended, it is true, to drink the cocktails which he did drink and which caused his death, but he did not intend to drink poisonous wood alcohol, and did not know that wood alcohol was contained in what he was drinking." *Zurich General Accident & Liability Insurance Co. v. Flickinger* (C. C. A. 1929) 33 F.(2d) 853, 68 A. L. R. 161.

Readings: Insurance—Death by Accidental Means.

1. Was "Accidental Means" Where Intoxicating Beverage Contained Wood Alcohol? *Zurich General Accident & Liability Insurance Co. v. Flickinger* (C. C. A. 1929) 33 F.(2d) 853, 68 A. L. R. 161.
2. The Preceding Case Discussed. 25 Ill. Law Rev. 97.

CHAPTER 21

INJURIES RESULTING FROM UNSAFE CONDITION OF PREMISES

Negligence in Relation to Condition of Premises Defined

"Negligence, as defined by this court, is a failure to exercise that degree of care and forethought which a prudent person might be expected to use under similar circumstances. The degree of care necessary to be exercised under circumstances of the character here adverted to is always commensurate with the danger incident to, or reasonably to be apprehended from, the instrumentalities used, and is measured by the extent of the legal duty owing to the person who might sustain an injury from any neglect in the use of such agencies. In the case at bar, the defendants, having opened their store for the sale of goods, thereby solicited patronage; and the plaintiff, having accepted their invitation, was not a trespasser or mere licensee, but was rightfully on the premises by invitation of the defendants, who owed to him a legal duty, which demanded reasonably safe arrangements for the protection of their customers." *Shobert v. May* (1901) 40 Or. 68, 66 P. 466, 55 L. R. A. 810, 91 Am. St. Rep. 453.

Personal Injuries Resulting from Condition of Premises

If a druggist, being owner or lessee of a building, maintains a store, he impliedly invites customers to enter and make purchases, and in so doing he assumes a duty to keep his building and premises in a reasonably safe condition so that injury will not result to his customers. He is not an insurer of the safety of a customer, but is liable for his negligence and intentional acts only. In the case of negligence, the injured person may be unable to recover damages if he was guilty of contributory negligence. The shopkeeper's liability does not extend to parts of the premises not thrown open to customers and not intended for use by customers. A large amount of litigation arising out of the alleged negligence of the storekeeper has arisen from varied situations such as swinging doors, trapdoors, aisles, platforms, revolving doors, elevators, slippery floors and entrances, stairways, escalators, and falling objects.

Customer Injured by Falling over a Weighing Machine

Case:

NYE v. LOUIS K. LIGGETT CO.

Supreme Judicial Court of Massachusetts, 1916. 224 Mass. 401,
113 N. E. 201.

Action by Abbie F. Nye against the Louis K. Liggett Company. The plaintiff was injured by falling over a weighing machine situated near the door in the defendant's drug store.

Question: If the plaintiff, as a customer, was lawfully in the defendant's store, did the defendant owe her a duty to use ordinary care to keep the premises in a reasonably safe condition for her use?

BRALEY, J. The plaintiff was lawfully in the store, and while there the defendant owed her the duty to use ordinary care to keep the premises in a reasonably safe condition for her use as a customer. It sold soda, drugs and the articles usually dealt in by the proprietor of a retail drug store, and the jury could find from the evidence which included the plan, that when viewed in connection with the volume of patronage as described by her the weighing machine over which the plaintiff stumbled and fell as she turned from the soda counter to pass out of the store, had been placed too near the entrance to permit customers to make their exit safely, and that the defendant in the exercise of due care should have discovered this probable danger and removed the machine. While the case is close we cannot say as a matter of law that there was no evidence for the jury of the defendant's negligence.

Review of Nye v. Louis K. Liggett Co.:

1. What caused the injury to the plaintiff?
2. How is the question stated?
3. What difference did it make that the plaintiff was lawfully in the store?
4. What duty does the storekeeper owe to his customers as to the condition of his premises?

Readings: Injuries Caused by Condition of Premises. Coal hole on the premises. Campbell v. Sutliff (1927) 193 Wis. 370, 214 N. W. 374, 53 A. L. R. 771.

Slippery Floors

As stated, it is the duty of a storekeeper to maintain his premises in a reasonably safe condition for the use of his customers. Slippery floors have been the cause of many accidents and injuries. It has been decided that the use of an oil dressing on floors is permissible, but the storekeeper must use ordinary and reasonable care that this does not make the floor so slippery as to be dangerous to walk upon. The law makes it necessary to use ordinary care only. If other stores in the same community are in the habit of using the same floor dressing, this fact may be considered in evidence in determining whether the proprietor has exercised ordinary care. The fact that he has used the same floor dressing for a long period of time without previous accident is evidence of ordinary care. If some slippery substance, as grease or fruit peelings, has fallen upon the floor and has not been removed within a reasonable time, the owner may become liable for a resulting injury to a customer.

Customer—Injured by Falling on Slippery Floor Mat

The plaintiff, an elderly lady, sued the proprietor of a department store for injuries resulting from a fall on a slippery mat on the floor. The defendant was held liable on the ground that a storekeeper must use ordinary care to protect customers from harm. *Dagleish v. Oppenheim, Collins & Co.* (1930) 302 Pa. 88, 152 A. 759, 6 Temple Law Quarterly, 122, 123.

Customer Injured by a Fall on a Slippery Floor

Case:

KASS v. GLATZEL.

Supreme Court of New Jersey, 1929. 147 A. 652, 7 N. J. Misc. 1006.

Action for damages for injury sustained by falling on a slippery floor. There was a verdict for plaintiff in the sum of \$1,250.

The plaintiff entered the store and was gazing into one of the show windows, and, according to her testimony, took no notice of the condition of the vestibule at that time; that she was about five or ten minutes in the store and made purchases. As she was leaving, she noticed the floor of the store was quite wet; she walked over and just entered the vestibule, when she slipped and

fell. The fall caused her hands to come in contact with the floor and then she perceived the floor was soapy and slippery. Her clothes which came in contact with the floor were soapy and very dirty.

The defendant sought to have the case reversed: (1) That there was no evidence that defendant had any knowledge that the vestibule was wet and soapy; (2) that plaintiff was guilty of contributory negligence.

Question: Should the case be reversed for the reasons assigned?

PER CURIAM. Neither of these propositions is sustained by the proof. As to the first ground of appeal, there was proof the floor was wet, and the defendant himself testified he washed the floor that morning. According to plaintiff's testimony the floor was not only wet, but it was slippery from the soap which had been used in the washing. The defendant having admitted he washed the floor up to the entrance door, the jury had a right to infer from the fact that there was a down grade from there to the street, that the soap and water used to wash the floor, by the defendant, seeped down into the vestibule. The jury was warranted from defendant's testimony to infer that he had knowledge, not only that the floor was wet, but the vestibule also.

As to the second ground for reversal, that the plaintiff was guilty of contributory negligence, it is quite clear that, under the circumstances which confronted her, the question whether she had exercised reasonable care for her own safety in leaving the store was a jury question. There was no testimony of any fact or circumstance which tended to indicate to her mind that the floor was dangerous to walk upon, and that it was a hazardous undertaking, on her part, to leave the store by the only exit afforded for that purpose.

Review of Kass v. Glatzel:

1. How large a verdict was secured by the plaintiff?
2. Relate the facts.
3. On what grounds did the defendant seek to reverse the case?
4. Did the defendant have notice that the floor was in an unsafe condition?
5. Was the plaintiff guilty of contributory negligence?
6. State the duty of the storekeeper to keep the floors in a proper condition.

Customer Injured by Cash Boy Snapping a Pin

Case:

SWINARTON v. LE BOUTILLIER.

Court of Common Pleas of New York, 1894. 7 Misc. 639, 28 N. Y. S. 53, 31 Abb. N. O. 281, 58 N. Y. St. Rep. 345.

Action by Anna E. Swinarton against George Le Boutillier for personal injuries sustained by plaintiff while a customer in defendant's dry goods store; plaintiff's eye being put out by a pin thrown or shot by a cash boy. Verdict in favor of plaintiff for \$10,000, and defendant appeals.

The defendant kept in his store a number of cash boys for attendance on customers; that among these boys the propensity and habit of "snapping pins" at objects and persons in the store were prevalent; that this snapping or shooting pins by these boys was likely to inflict injury on defendant's customers, and did, in fact, inflict the injury of which the plaintiff complains; that this habit of snapping or shooting pins by these boys had existed for months and was known or ought to have been known by the defendant; and that no precaution had been taken by defendant to suppress this habit.

Question: Was defendant bound to use ordinary care and diligence to keep its premises in a safe condition for those who legitimately came there?

PRYOR, J. It being settled law that an occupant of land is bound to use ordinary care and diligence to keep the premises in a safe condition for the presence of persons who come thereon by his invitation, express or implied, or for any other purpose beneficial to him (2 Shear. & R. Neg. § 704), the questions presented by the facts as found are: (1) Were the premises in an unsafe condition, in the legal sense; and (2) if so, was that condition the effect of defendant's want of care and diligence? Had plaintiff sustained the injury from a defect in the premises, or in machinery upon them, assuming negligence in keeping them, the liability of the defendant would be beyond dispute. But here the injury was inflicted by the act of a boy with a propensity to mischief, in the employ of the defendant, and by him placed on the premises in a position to do the injury. Why does not such boy, so employed and placed, constitute a danger upon the premises as effectual for evil as a trapdoor or pitfall or a

dilapidated stairway? That the cause of the injury need not be an inanimate agency is shown by the decision in *Loomis v. Terry*, 17 Wend. 197, where it was held that even a trespasser may maintain an action for the bite of a ferocious dog left at large on the defendant's lot.

The case at bar may be new in the instance, but not in the principle; and in the absence of authority to the contrary, upon the analogies of the law and the dictates of common sense, we adjudge that the presence of the boy on the premises, with his propensity to evil doing, was a danger against which it was the duty of the defendant, by the exercise of proper care, to protect the plaintiff.

Review of Swinarton v. Le Boutillier:

1. Did it help the plaintiff's case that she was a customer?
2. Give the important facts.
3. State the general question and the two specific questions.
4. Why was it negligence to keep these boys?
5. Why were these boys a danger upon the premises?
6. Was it the duty of the defendant to guard against injury which might be caused by the boys?

Owner of Store Not Liable unless There was Some Fault on His Part

Case:

SPICKERNAGLE v. C. S. WOOLWORTH & CO.

Supreme Court of Pennsylvania, 1912. 236 Pa. 406, 84 A. 909,
Ann. Cas. 1914A, 132.

Action for damages against a retail shopkeeper for personal injuries sustained by a customer's falling on the floor. The plaintiff, while in the store of the defendant for the purpose of purchasing goods, slipped and fell and sustained an injury to her ankle; she brought suit to recover damages, alleging that the fall was caused by reason of the floor having been oiled and negligently suffered to remain in an unsafe condition.

Question: Was it necessary for the plaintiff to plead and prove some specific act of negligence on the part of the defendant, before recovery can be had?

BOUTON, P. J. Upon the trial of the case we granted a compulsory nonsuit on the grounds that no negligence on the

ARTHUR DRUGS

part of the defendant has been proved. The mere fact that the plaintiff was injured while lawfully on the premises of the defendant does not raise a presumption of negligence on the part of the latter.

The burden, therefore, rested on the plaintiff to show some specific act of negligence, in which we are of the opinion she entirely failed. It is not negligence to oil a floor or to have an oiled floor.

The plaintiff failed to show how long before the accident the floor had been oiled; that the substance used thereon was unusual or improper; that it was oiled in an improper manner, or that it was in any other or different condition than would result from proper oiling. There is no evidence that the material used was not the same as in general use for floor dressings, and to have submitted the case to the jury would have been to have allowed them to guess these important and unproven facts or at least some of them. We are still of the opinion that the compulsory nonsuit was properly granted.

Review of Spickernagle v. C. S. Woolworth & Co.:

1. Summarize the essential facts.
2. Restate the question.
3. Why was a compulsory nonsuit granted?
4. In this case, what burden rested on the plaintiff?
5. What did the plaintiff fail to show?
6. Why was it improper to allow this case to go to the jury?

Readings: Duty to Keep Floor of Store in Proper Condition.

1. Banana Peel. *De Velin v. Swanson* (R. I. 1909) 72 A. 388.
2. Peanuts. *Langley v. F. W. Woolworth Co.* (1926) 47 R. I. 165, 131 A. 194.
3. Small Piece of Tallow. *John Thompson Grocery Co. v. Phillips* (1912) 22 Colo. App. 428, 125 P. 563.

Attractive Nuisances—Duty to Protect Children

Does the owner or occupier of premises owe a special duty to small children who may come upon his premises either for business purposes or as trespassers? This question must be answered in the affirmative, and a brief explanation of the "attractive nuisance" doctrine becomes necessary. This rule of law is stated briefly by Justice Humphreys of Arkansas

in *Central Coal & Coke Co. v. Porter* (see readings) as follows: "Where an owner permits to remain unguarded on his premises anything dangerous which is attractive to children, and from which injury may reasonably be anticipated, he is liable if a child is injured thereby." Some of the early cases involving this doctrine arose out of injuries to children in railroad yards, and so are often spoken of as "turntable cases."

Attractive Nuisance—Principles Involved

"That, where dangerous and attractive machinery is maintained and exposed to the observation and temptation of little children, the natural allurements of which will tempt them to go about, or upon, and against the danger of which action their immature judgment interposes no warning or defense, the conduct of the party in so maintaining such machinery involves an act of negligence for which he is liable in damages where a child of the above description, having gone upon or playing about and with the machinery, is thereby injured, notwithstanding that the child so injured is a trespasser upon the land on which the machinery is maintained. This rule is, of course, to be understood with the qualifications that the danger of the machinery, although novel and attractive to the immature mind of the child, can be fully or sufficiently guarded to protect against injury without destroying its usefulness for the purpose for which it is maintained. The principle from which the doctrine of turntable cases is deduced or upon which it is supported is spoken through the maxim of the law that: One must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible, consistent with its proper use." Justice Hart in *Polk v. Laurel Hill Cemetery Association* (1918) 37 Cal. App. 624, 174 P. 414.

Attractive Nuisances in Relation to Drug Business

The doctrine of attractive nuisances has a special application to the business of a druggist, not only on account of his building and premises, but owing also to the dangerous qualities of many of the articles owned and sold. There has been much litigation over injuries to children under the head of attractive nuisances, and from a review of these cases it is found that dangerous qualities under this rule of law lurk in alcohol, alcohol barrels, blasting powder, calcium carbide, corrosive chemicals,

denatured alcohol, dynamite, explosives, fuse caps, gasoline, hot grease, lime, naphtha, oil, oil cans, phosphorus, tar, turpentine, fireworks, and many others. The conduct of any business, whether it be that of the druggist, or otherwise, involves the handling or using of some of the following instrumentalities: Automobiles, ashes, barbed wire, bonfire, buildings, cars, cellars, cesspool, cogwheels, ditches, fire, furnace, hot water, ladder, lumber piles, poisonous berries, swings, tanks, ventilating fans, water tanks, or wheels. It is thus evident that the proprietor of any business must see that on his premises no dangerous article or condition exists which, though perfectly harmless to adults, might, if an accident were to happen to a child, be classed as an attractive nuisance, and so impose a liability to respond in damages.

Dynamite as an Attractive Nuisance

Case:

MATTSON v. MINNESOTA & NORTH WISCONSIN RAILROAD CO.

Supreme Court of Minnesota, 1905. 95 Minn. 477, 104 N. W. 443,
70 L. R. A. 503, 111 Am. St. Rep. 483, 5 Ann. Cas. 498.

This action was brought to recover damages for injuries to plaintiff's minor son. It appears without dispute that the plaintiff's two sons—Hjalmar, for whose benefit this action is prosecuted, and a younger brother—both under the age of 9 years obtained from some source a stick of dynamite, which they exploded, instantly killing the younger of the two, and permanently maiming and injuring Hjalmar.

Two principal questions of fact were presented for consideration of the jury, viz.: (1) Whether the dynamite resulting in the injury complained of was obtained from the premises of defendant; and (2) if so, whether defendant was guilty of negligence in permitting it to remain on or about its premises unguarded and unprotected.

BROWN, J. Defendant liable. Plaintiff relies for recovery upon the doctrine of the "turntable cases," while it is strenuously contended by defendant's counsel that the facts do not bring the case within that principle of law, that it conclusively appears that defendant took reasonable care of its dynamite, and that, conceding for the purposes of argument that the dynamite resulting in the injury to the boys was taken from its premises,

they were trespassers thereon, and no recovery can be had in this action.

The rule governing cases of this kind, stated, in substance, is that one who maintains dangerous instrumentalities or appliances on his premises of a character likely to attract children in play, or permits dangerous conditions to remain thereon with the knowledge that children are in the habit of resorting thereto for amusement, is liable to a child *non sui juris* who is injured therefrom, even though a trespasser. The rule is intended for the protection of children of tender years, who from immaturity are incapable of exercising a proper degree of care for their own protection.

There is nothing so attractive to young boys as articles of an explosive nature, and the greater the volume of sound that may be produced therefrom, the greater the attraction. As compared with an ordinary turntable, dynamite is vastly more attractive, and far more dangerous. Young children are incapable of comprehending the dangers in handling or exploding the same, and their natural instincts urge them into experiments with it whenever it comes within their reach. In view of these considerations, the rule of law imposed upon him who possesses such dangerous articles should be more exacting than in the case of a turntable; and, applying the rule to the facts before us, it is clear that the jury was justified in finding negligence upon the part of the defendant. It failed to take proper care of dynamite brought into this vicinity, and left it exposed upon the premises where children had, to the knowledge of its servants, been in the habit of loitering and amusing themselves.

Review of Mattson v. Minnesota & North Wisconsin Railroad Co.:

1. What relief was sought by the action?
2. Review the facts briefly.
3. What was the theory of the plaintiff's case?
4. What was strenuously contended by the defendant's counsel by way of defense?
5. State in substance the rule governing this kind of case.
6. What is the meaning of "*non sui juris*"?
7. When is a child a trespasser?
8. Why is the rule more exacting in relation to dynamite than in the turntable cases?
9. Why is an explosive so attractive?
10. What was the negligence of the defendant?

Bottle of Denatured Alcohol Not Necessarily an Attractive Nuisance

Digest of Case:

A bottle of alcohol left by defendant's servants beside a highway, not being of necessity dangerous, and not such an article as would induce or allure children to play with it, the result, children finding it, pouring some of it out, lighting it, and thereby being burned, was not such as, under the circumstances, might have been reasonably expected, necessarily to make the defendant liable. *Hall v. New York Telephone Co.* (1915) 214 N. Y. 49, 108 N. E. 182, L. R. A. 1915E, 191.

Readings: Children and Attractive Nuisances.

1. *Palermo v. Orleans Ice Manufacturing Co.* (1912) 130 La. 833, 58 So. 589, 40 L. R. A. (N. S.) 671 (hot water).
2. *Nelson v. McLellan* (1903) 31 Wash. 208, 71 P. 747, 60 L. R. A. 793, 96 Am. St. Rep. 902, 13 Amer. Neg. Rep. 627 (dynamite).
3. *Bransom's Adm'r v. Labrot* (1884) 81 Ky. 638, 50 Am. Rep. 193, 5 Ky. Law Rep. 827 (lumber).
4. *Tucker v. Draper* (1901) 62 Neb. 66, 86 N. W. 917, 54 L. R. A. 321, 10 Amer. Neg. Rep. 307.
5. *Powers v. Harlow* (1884) 53 Mich. 507, 19 N. W. 257, 51 Am. Rep. 154.
6. *Central Coal & Coke Co. v. Porter* (1926) 170 Ark. 498, 280 S. W. 12.
7. *Depew v. Kilgore* (1926) 117 Okl. 263, 246 P. 606 (dynamite caps).
8. *Donk Brothers Coal & Coke Co. v. Leavitt* (1903) 109 Ill. App. 385 (cistern).
9. Attractive Nuisances—Trespassing Children. *Woodson* in 5 Or. Law Rev. 238–243.
10. "The Allurement of Infants" by Browne, in 31 Amer. Law Rev. 891–904.

Nuisances—Explosives

The storage of gasoline, powder, dynamite, nitroglycerine, or other explosive may constitute a nuisance if they are so placed as to be a menace to the persons or property of those living in the vicinity. If explosives are stored so as to constitute a nui-

sance, and injury results from the explosion thereof, the person keeping or storing them is liable for the damage caused. In cases where statutes or ordinances regulate the storage of explosives and these regulations are not complied with, if injury is occasioned thereby, the question of liability is easy to establish against one creating and maintaining the nuisance. A powder magazine is a nuisance as to all property and residents near enough to it to be in danger from an explosion, regardless of the question of negligence in the manner of storing the powder.

Reading: Storing Explosives as Creating a Nuisance. Whittemore et al. v. Baxter Laundry Company (1914) 181 Mich. 564, 148 N. W. 437, 52 L. R. A. (N. S.) 930, Ann. Cas. 1916C, 818.

Nuisance—Drug Store Not Nuisance *per se*

Certain property owners of Fort Worth attempted to enjoin the erection of a building in a residence district to be used for a drug store and grocery store on the ground that the businesses would constitute a nuisance. The court held that "The law is so well settled by the text-writers and adjudicated cases that it seems hardly necessary to do more than to refer to the authorities. It is not contended, nor can it be properly contended, that a drug store and meat market of the character described in the plaintiffs' petition constitutes a nuisance *per se*, and it is well settled that in such cases equity will not interfere by injunction to prevent occurrences which a complaining party may fear will inflict inconvenience or injury." *Dickson v. Barr* (Tex. Civ. App. 1921) 235 S. W. 977.

Snow and Rain from Roof

The owner of a building must not permit water from the roof of his structure to run onto the land of an adjoining owner to the injury of the land, buildings, or other property of his neighbor. The old common-law rule was that the surface water was a "common enemy," and that the landowner could keep it off his premises, consume, or divert it as he desired. This rule does not permit any one to collect water and throw it upon a neighbor's property to his annoyance or injury. If, in consequence of the disposal of such collected water, a building, even though defectively constructed, is injured, liability attaches to the person on whose property the water was collected.

Requiring Snow to be Removed from Sidewalk

Practically every city has an ordinance requiring an adjoining owner to remove the snow from the sidewalks. True, in a few states, such ordinances have been held invalid as taking private property without due process of law. In the New York case (see readings), the court said: "Its presence retards travel, interrupts business, and interferes with the safety and convenience of all classes. It is a frequent cause of accidents and this affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city, with many hundreds of miles of streets, to remove the snow in time to prevent injury to those who have a right to travel upon the sidewalks unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door and it is both reasonable and necessary that he should be compelled to do so."

Readings: Municipal Ordinances Requiring Snow to be Removed from Walks.

1. State v. McCrillis (1907) 28 R. I. 165, 66 A. 301, 9 L. R. A. (N. S.) 635, 13 Ann. Cas. 701.
2. Ordinance Valid. Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480, 10 L. R. A. 178, 19 Am. St. Rep. 490.
3. Such Ordinance Not Valid in District of Columbia. McGuire v. District of Columbia (1904) 24 App. D. C. 22, 65 L. R. A. 430.

Awnings or Signs Suspended over Street

Streets and alleys usually belong to the city or town in which they are located rather than to the individuals whose property they adjoin. This being so, awnings or signs which project over a street extend beyond the owner's property, and it is generally necessary to secure a license from the city before having such structures erected. The putting up of signs or awnings without the proper license or in contravention of an ordinance may subject the owner or tenant to penalties on two scores—one for injury to passersby, caused by the structures, the other, to the city, for violation of the ordinance.

On the other hand, if the proper license has been secured and the required inspections made, then the liability of the owner for any injuries caused by them is determined by the usual laws of negligence. When a person lawfully on a street is injured by a falling awning or sign, there is a presumption of negligence on the part of the one responsible for the structure, and the burden is on him to disprove his negligence.

Readings: Awning or Sign over the Street. Injury Caused by a Sign Falling. Waller v. Ross (1907) 100 Minn. 7, 110 N. W. 252, 12 L. R. A. (N. S.) 721, 117 Am. St. Rep. 661, 10 Ann. Cas. 715.

CHAPTER 22

PRICE FIXING, RESTRAINT OF TRADE, GOOD
WILL**Resale Price Fixing by Manufacturers or Wholesalers**

Has a manufacturer, producer, or wholesaler the right to control the resale prices of his products? The answer to this question depends largely upon the methods employed to achieve the end.

An early case involved the legality of making rebates to dealers who maintained selling prices indicated by the manufacturer. The court held that this practice did not constitute an unlawful restraint of trade, since the purchaser was not in any way bound to maintain resale prices, but was merely offered a rebate as an inducement to do so. *In re Greene* (C. C. 1892) 52 F. 104. No later cases have been found involving control of resale prices through the rebate system.

Where a bona fide relationship of agency exists, resale prices can be controlled through agreements with, or instructions to, agents. *Cole Motor Car Co. v. Hurst* (C. C. A. 1915) 228 F. 280. But the agency must be one in fact and not in name only. Where title to the goods has passed to the jobber or dealer, he will not be considered the agent of the manufacturer under an agreement to maintain resale prices. *United States v. Kellogg Toasted Corn Flake Co.* (D. C. 1915) 222 F. 725, Ann. Cas. 1916A, 78.

Resale prices can be controlled through announcing a price policy and refusing to sell to price cutters, where no agreement to maintain prices has been entered into and where the methods employed to enforce price control do not amount to an implied contract. *United States v. Colgate & Co.* (1919) 250 U. S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443.

Where, however, the manufacturer attempts to control resale prices by entering into agreements with all or a controlling number of dealers in the commodity, such agreements have been held invalid as unlawful restraints of trade. The leading case on this subject is the *Dr. Miles Medical Company Case*. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 31 S. Ct. 376, 55 L. Ed. 502. This case was decided in 1911, and the

doctrine has since been expressly reaffirmed in later cases. *U. S. v. A. Schrader's Son, Inc.* (1920) 252 U. S. 85, 40 S. Ct. 251, 64 L. Ed. 471. Two circumstances in the *Dr. Miles Case* deserve special attention: (1) The restrictive agreements purported to be contracts of agency; and (2) the products were proprietary medicines manufactured under secret formulas. The court distinguished between the agency contracts with wholesalers, where the goods were consigned to the wholesaler and title thereto remained in the proprietor until the goods were sold, and the contracts with the retailers which were agency contracts in name only. But the court nevertheless held that the system of contracts with wholesalers and retailers throughout the country was a system of interlocking restrictions which sought to eliminate all competition by controlling not merely the prices at which agents might sell the products, but the prices for all sales by all dealers at wholesale and retail, whether purchasers or subpurchasers. Accordingly, the restrictive agreements were held invalid as unlawful restraints of trade both at common law and under the Sherman Anti-Trust Act.

The doctrine of the *Dr. Miles Case* was extended to cover restrictive agreements implied from conduct in the *Beech Nut Case*. *Federal Trade Commission v. Beech Nut Packing Co.* (1922) 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, 19 A. L. R. 882. In that case the manufacturer did not enter into express agreements with dealers to maintain resale prices. Instead the Beech Nut Company issued circulars and price lists suggesting resale prices at wholesale and retail; maintained lists of price-cutting dealers who were not to be supplied with products until they gave satisfactory assurance that they would maintain the resale prices in the future; solicited the co-operation of dealers in reporting the names of price-cutting dealers; marked each package with serial numbers for purposes of tracing and identification. These practices were held to amount to an implied agreement in unlawful restraint of interstate commerce.

The fact that goods are manufactured by special process or by secret formula, or are patented, copyrighted, or trade-marked, is immaterial in considering the validity of a contract imposing conditions as to resale price after the right of sale has once been exercised by the manufacturer. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, *supra*; *Boston Store v. Amer. Graphophone Co.* (1918) 246 U. S. 8, 38 S. Ct. 257, 62 L. Ed. 551, *Anq. Cas.* 1918C, 447; *Ingersoll v. McColl* (D. C. 1913) 204 F. 147.

A manufacturer cannot create a contract relationship between himself and third persons into whose hands the goods may come

by attaching a printed notice to the goods or on the label imposing conditions attempting to control the resale price in the hands of any future purchaser of the goods. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339, 28 S. Ct. 722, 52 L. Ed. 1086.

The foregoing may seem like an academic discussion at the present time when ruthless competition and its attendant price cutting is no longer considered an unmixed social blessing. The anti-trust laws, both federal and state, are in a state of virtual suspension at present, and price-fixing policies are not only countenanced, but encouraged, in the industrial codes approved by the National Recovery Administration. It is difficult to foresee whether the inroads made into our anti-trust policy by emergency legislation will have any permanent effect after the present industrial emergency has passed. If not, the doctrine of the *Dr. Miles Medical Case*, *supra*, will, in all probability, continue to render invalid, as unlawful restraints of trade, restrictive agreements aiming at control of resale prices by a controlling number of dealers in a given commodity.

Readings: Right to Control the Resale Price of Goods.

1. *Garst v. Wissler* (1902) 21 Pa. Super. Ct. 532.
2. *Locker v. American Tobacco Co.* (1907) 121 App. Div. 443, 106 N. Y. S. 115, affirmed in 1909, 195 N. Y. 565, 88 N. E. 289.
3. *Federal Trade Commission v. Beech Nut Packing Co.* (1922) 257 U. S. 441, 42 S. Ct. 150, 66 L. Ed. 307, 19 A. L. R. 882.
4. *Jayne v. Loder* (1906) 149 F. 21, 78 C. C. A. 653, 7 L. R. A. (N. S.) 984, 9 Ann. Cas. 294.
5. *John D. Park & Sons v. National Wholesale Druggists' Association* (Sup. 1896) 50 N. Y. S. 1064.
6. *United States of America v. Colgate & Co.* (1919) 250 U. S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443.

Restraint of Trade

The phrase "restraint of trade" has several meanings, but for our purpose it may be defined as a contract which attempts to restrict a party in his right to transact business or to perform work, by limitation as to place, price, kind of business, or manner in which he may work, labor, or engage in business. Early cases held all such contracts void, as denying the promisor means of making a living for himself and family and depriving the public of the services of one of its useful members. However, in more

recent years it has been held that certain contracts in restraint of trade are both valid and beneficial.

Valid Restraint of Trade

A contract in restraint of trade can be made and enforced if its terms are reasonable, and if it seeks to accomplish a lawful end. The promise must be made to protect the promisee in a lawful enterprise, and it must not be too extensive as to territory covered nor too long as to the time it is to be in effect. The promise must not be of greater extent than is necessary for the protection of the business of the promisee. A contract in restraint of trade which might otherwise be valid is sometimes held invalid on the ground of public policy, if its effect on the public is detrimental. A carefully drawn contract in restraint of trade on the sale of a business may benefit both parties. A person anxious to sell a business may be unable to secure a purchaser without furnishing the buyer some protection in the use and enjoyment of the property purchased; likewise the purchaser may not be secure in his new undertaking without the protection of a contract in restraint of trade.

Valid Restraints—Taft's Rule

"For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, good-will, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowl-

edge acquired in such business." Taft, C. J., in *United States v. Addyston Pipe & Steel Co.* (1898) 85 F. 271, 29 C. C. A. 141, 46 L. R. A. 122.

Digest of Cases on Restraint of Trade:

1. Copartner. A promise by a retiring partner to his copartner purchasing the business not to engage in the drug business in that town so long as the copartner remains in the business in that town is not void as a restraint of trade. *Crump v. Ijigon* (1904) 37 Tex. Civ. App. 172, 84 S. W. 250.

2. Lease. Smith purchased the drug business and took lease on Brown's property. Brown covenanted not to engage, directly or indirectly, in the drug business within two miles of the apothecary shop which Smith had leased. It was held to be a valid agreement. *Smith v. Brown* (1895) 164 Mass. 584, 42 N. E. 101.

3. Vendor of Shares of Stock. A contract wherein the vendor of shares of stock in a drug company covenants with the vendees not to engage in the drug business either directly or indirectly in the city during a period of five years is not invalid as an unreasonable restraint of trade. *Kradwell v. Thiesen* (1907) 131 Wis. 97, 111 N. W. 233.

Good Will

In contracts for the sale of business enterprises, the expression "good will" is frequently used. "Good will" arises from the probability that former customers will resort to the old accustomed place. Though not a part of the business, it has a value and is subject to bargain and sale. In some cases it has been held that the sale of good will in connection with the sale of a business gives an implied contract on the part of the seller not to engage in a competing business, but frequently this rule does not prevail, so, if protection of this sort is desired, it should be expressly provided in the contract. Usually, unless provision has been made to the contrary, a seller may enter into a competing business, but he may not solicit his former customers, nor may he represent himself as a successor of the old business. He may use his own name in a competing business, but may not use any particular trade-name the former business had.

Readings: Restraint of Trade and Good Will. Not to compete after term of employment. 28 Columbia Law Rev. 81-87.

CHAPTER 23

INCIDENTS OF TRIAL AND ADMISSIBILITY OF EVIDENCE

Indictment

No person can be tried for a crime without a formal accusation. Many prosecutions under the drug laws are commenced by the use of an indictment. An indictment may be defined as a written accusation charging the person named therein with some specific crime, and is presented in the proper legal form, by a grand jury under oath, to the court that has jurisdiction to try the case.

Sufficiency of Indictment

In *State v. Enoch* (see readings), one B. B. Enoch was indicted in the following words: "The grand jurors of the State of West Virginia in and for the body of the county of Jackson and now attending the said court upon their oaths present that B. B. Enoch on the —— day of May, A. D. 1881, and on divers other days since that time, did carry on the business of a druggist in said county without a license therefor, against the peace and dignity of the state. Upon the information of —— sworn in open court and sent to the grand jury to give evidence on this indictment."

Held: "No defect in the form of the indictment is pointed out. The allegation that the defendant carried on the business of a druggist without a license therefor, using as it does the language of the statute, is sufficient."

Readings: Indictment—Form and Purpose. Sufficiency of indictment. *State v. Enoch* (1885) 26 W. Va. 253.

Burden of Proof

By "burden of proof" is meant the duty of establishing by competent evidence the existence of a fact or facts in order to succeed in the litigation. If the party who has the burden of proof does not offer any evidence in his cause, the decision must be found against him.

Burden of Proof When Druggist Prosecuted for Not Having a License

When a druggist is being prosecuted under a statute for not having a license or for not having a registered pharmacist in his employ, the burden of proof rests upon the accused to establish the affirmative, or he will be adjudged guilty. In *Greenleaf on Evidence* the explanation is given as follows: "Where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any person except those who are duly licensed therefor, as for selling liquor, exercising a trade or profession, and the like."

Burden of Proof on Prosecution for Not Having a License

Case:

STATE v. HORNER.

Supreme Court of Appeals of West Virginia, 1903. 52 W. Va. 373, 43 S. E. 89.

W. J. Horner was convicted of doing business as a druggist without having the proper license, and he brings this error to the Supreme Court of Appeals of West Virginia.

DENT, P. In the case of the State against W. J. Horner, being a prosecution for unlawfully carrying on the business of a druggist without a state license therefor, the only question presented is as to whether the burden of proving the want of license devolved upon the state or the defendant. The state showed that the defendant was carrying on the business of a druggist as charged in the indictment, and then rested. The defendant offering no evidence, the court instructed the jury to find a verdict of guilty. To this the defendant excepts, and insists that the court should presume that he had a license unless the contrary is shown. While there is some authority to sustain this contention, the decided weight is to the contrary, and to the effect that the state has the right to require a person carrying on a business which the statute makes unlawful without license, to establish such license as a matter peculiarly within the knowledge and convenience, subjecting him to no hardship, but promoting the re-

strictions of the law and thereby furthering the ends of justice. Negative averments peculiarly within the knowledge of the opposite party are usually taken to be true if such party remains silent, on the theory that silence is presumptive evidence of assent, and amounts to a legal admission or confession as to such averments. In 17 Am. & Eng. Enc. Law (2d Ed.) 330, many authorities on this question are collected. Also see 13 Enc. Pl. & Prac. 119. The judgment is affirmed.

Review of State v. Horner:

1. For what offense had Horner been convicted?
2. What was the only question presented?
3. What is meant by "burden of proof"?
4. How much evidence did the state introduce?
5. Why did not the defendant introduce some evidence?
6. The court gave what instruction to the jury?
7. Why did the defendant except to this instruction?
8. State the rule of the case.
9. What were the negative averments in the case?

Burden of Proving that the Injury was the Result of the Defendant's Mistake

Case:

FAGAN v. McRAE.

Supreme Court of New York, Appellate Term, First Department, 1918.
169 N. Y. S. 577.

The defendant, a druggist, is charged with having failed to fill a prescription given by plaintiff's physician according to directions. The defendant admits the filling of the prescription, but denies that it was incorrectly filled. The medicine was prepared and delivered by defendant on Tuesday, January 9, 1917. The plaintiff was given the medicine every three hours. On Thursday the doctor called, and plaintiff had by that time taken two-thirds of the contents of the bottle. She had become very sick on Tuesday night and had grown worse. The doctor was shown the bottle on Thursday, and found the contents to be of a whitish color. After that (January 11th) plaintiff took no more of the wrong medicine. She continued ill and was treated by the physician for three months. The defendant offered no evidence. The court awarded the plaintiff \$500 as damages.

ARTHUR DRUGS

Question: Where a druggist delivered the wrong medicine on a physician's prescription, who has the burden of proving that the wrongful act was the cause of the illness that followed?

PHILBIN, J. The proof that defendant had delivered a medicine different from the one ordered by the physician seems to be adequate. We are thus called upon to determine what injury, if any, was caused by the error. Although plaintiff was ill for three months, it nowhere appears in the record what her ailment was at any time; in fact, it does not appear that the physician himself knew. All we have are vague suggestions that the plaintiff may have been suffering from so-called German Measles. The only evidence from which any inference may be drawn as to the effect of the wrong medicine is the physician's testimony that the medicine certainly was bad for the plaintiff. The witness being unacquainted with the ingredients of the medicine, could have had no reason for his conclusion, other than the circumstance that a different medicine was given. The fact that the plaintiff grew worse might, for all that appears, have simply been due to the failure of the patient to receive the benefit of the remedy prescribed. The burden was on the plaintiff to show that the result of the wrongful act of the defendant—the giving of the wrong medicine—was the proximate cause of the injury claimed to have been suffered. The plaintiff failed to sustain the burden. Judgment reversed, and new trial ordered, with \$30 costs to appellant to abide the event.

Review of Fagan v. McRae:

1. What charge was made against the defendant?
2. Give a brief review of the facts.
3. State the question.
4. Was there proof that the defendant delivered the wrong medicine?
5. Why was it necessary to establish that the error of the druggist had caused the injury?
6. On whom was the burden of proving that the error of the druggist was the proximate cause of the injury?

Readings: Burden of Proof When Failure to Comply with a Statute is Involved.

1. Not Having a Registered Pharmacist in His Employ. *People v. Nedrow* (1884) 16 Ill. App. 192.
2. Not Having a License. *Suffolk County v. Shaw* (1897) 21 App. Div. 146, 47 N. Y. S. 349.

Entrapment

Of late much discussion has arisen over the practice of officers or other persons interested in the enforcement of certain laws using underhand methods to secure evidence against violators of such laws. This practice is known as entrapment, and, when used for the purpose of instituting criminal proceedings, is much to be deplored. The Anti-Narcotic Act, the Volstead Act, and the legislation resulting therefrom, have been the basis for much of this sort of thing. It has been felt by many that the fact that an illegal sale was made at the solicitation or instigation of an officer with the intention of starting a criminal prosecution should be a defense, but this is not true. In such a case, even though the officer pretends to co-operate with the accused, it is no defense. This seems to be the attitude taken by courts, whether the accused is prosecuted under a federal statute, a state statute, or a city ordinance.

Facilities for perpetrating a crime, purposely placed in the way of a person, in no way exonerate him for its commission. This rule is especially applicable when the offense is one of a kind repeatedly committed, and in which the solicitation furnishes evidence of habitual violation of the law.

Defendant Relied on the Defense of Entrapment

Case:

FIUNKIN v. UNITED STATES.

Circuit Court of Appeals of the United States, 1920. 285 F. 1.

The defendant, Fiunkin, was indicted on two counts, one for having sold to one Donovan Collins one-quarter dram of morphine, and the other for having sold to him one-quarter dram of cocaine, without having paid the tax as required by what is known as the Harrison Narcotic Act. After trial, the jury found him guilty on both counts. At the close of the government's case, the defendant moved for an instructed verdict in his favor. This was denied, and, the defendant offering no testimony, the case went to the jury under instructions. The evidence shows that Dr. C. W. Montgomery, who is connected with the Internal Revenue Department, and Joseph Condit, who had been detailed by the United States Army to the Department of Justice, on the date named in the indictment took with them Donovan Collins, an addict, in the city of San Francisco, and

there gave him a marked \$5 bill and a marked silver half dollar, and instructed him to go to the defendant's place of business and purchase a quarter dram each of morphine and cocaine, which defendant is charged with selling without paying the tax required by law. When the purchase had been consummated, the defendant was arrested, and under search warrant search was made of his person and his place of business. The marked money was found on his person, and five other packages of morphine were found on the premises.

Question: Does the fact that government officers furnished marked money with which morphine and cocaine were bought bar a prosecution for the sale of such drugs without payment of the tax therefor, if the officers did not incite or entrap the accused to commit the offense?

Held: It is argued that the defendant was induced through the machinations and instigations of the government officers, to commit the offense, or, in other words, that he was entrapped by such contrivance of the officers to do the thing which the law condemns. The evidence fails to show, however, that such was the case. The officers had nothing to do with the defendant's having the drugs in his possession. They had nothing to do with his willingness to sell the same for a consideration. They had nothing whatever to do with the conditions that prevailed prior to the time they sent the addict to the store to make the purchase, nor with the defendant's state of mind or purpose of action, should opportunity present itself, of dealing with the drug as a commodity for sale to those who were willing to buy. Nor did they offer any inducement to the defendant to sell except that they did, through Collins, offer to buy, and proffered the amount of money that defendant fixed as the price he was willing to take. Nothing beyond this appears in the testimony. It is true that the defendant was entrapped by what was done to sell the drug to the government officers, and to put himself in a position of yielding up evidence of his commission of the offense. But this does not signify that the government officers lured him, or incited, or induced him, to do what he would otherwise not have done, if any other addict had applied to him to purchase the drug.

The case is not different from those where decoy letters have been sent through the mails to ascertain whether parties are indulging in unlawful practices. *Grimm v. United States*, 156 U.

S. 604, 15 S. Ct. 470, 39 L. Ed. 550, is a case where such a decoy letter was sent through the mail under an assumed name, and was answered, also through the mail, giving the information requested. Defendant was indicted for unlawful use of the mails in giving the information, and the court held him guilty of the offense, notwithstanding the officers of the government thus participated in inducing him to write and post the offending letter.

Review of *Fiunkin v. United States*:

1. The defendant was indicted for what crime?
2. Give a summary of the facts.
3. State the question involved.
4. Was the defendant entrapped?
5. State the rules of the case.
6. Compare this case to the case of decoy letters.

Readings: Entrapment and Instigation as Defenses.

1. Prescription Secured for Purpose of Criminal Prosecution. *Hyde v. State* (1914) 131 Tenn. 208, 174 S. W. 1127.
2. Entrapment in Sale of Morphine. *Chicago v. Brendecke* (1912) 170 Ill. App. 25.
3. Detective Furnished Money to Witness to Secure Evidence of Criminal Act. *People v. Chipman* (1903) 31 Colo. 90, 71 P. 1108.
4. Entrapment in Liquor and Narcotic Law Violations. 45 *Harvard Law Review*, 381, 382; 20 *Kentucky Law Journal*, 98-101.

Purchase of Poison to Commit Homicide

In criminal cases it is customary to present in evidence the preparations made by the accused to commit the crime. When homicide has been committed by means of poison, one of the first clues pointing toward the guilty person is the fact that he either had poison in his possession or had purchased poison at some time previous to the perpetration of the crime. For instance, in a case where death was caused by white arsenic, it was shown that the accused had previously purchased "Rough-on-Rats" ostensibly to poison rodents. There was testimony to show that the article sold was of a uniform quality white arsenic. Even the fact that the poison was bought a year or more previous to

the time when the crime was committed does not prevent its being shown at the trial. On the other hand, the accused may offer any evidence available to explain why he had purchased poison or had it in his possession.

Readings: Purchase of Poison to Commit Homicide.

1. In Evidence That Accused Bought Poison the Year Before. *State v. Cole* (1886) 94 N. C. 958.
2. Accused had Bought "Rough-on-Rats." *Com. v. Hobbs*, 140 Mass. 443, 5 N. E. 158.
3. Accused may Explain Why He had the Poison. *People v. Cuff*, 122 Cal. 589, 55 P. 407.

Under Influence of a Drug—Opinion of Nonexpert Witness

When a person on the witness stand is not an expert, is it proper for him to testify that the accused was under the influence of a drug? The reasons for an affirmative answer are given in the following excerpts from cases: "The testimony of a number of witnesses who saw the plaintiff in St. Louis was that in their opinion he was under the influence of a drug. Before giving this opinion every one of these witnesses testified that he had seen persons under the influence of drugs, and was familiar with their effects. The testimony was clearly admissible." The recognized rule is thus well stated in *Hardy v. Merrill*, 56 N. H. 227, 22 Am. Rep. 449, cited with approval in *Jones v. Fuller*, 19 S. C. 66, 45 Am. Rep. 761: Courts and text writers all agree that upon opinions of science and skill, opinions may be received from persons specially instructed by study and experience in the particular art or mystery to which the investigation relates. But without reference to any recognized rule or principle, all concede the admissibility of the opinions of nonprofessional men upon a great variety of unscientific questions arising every day, and in every judicial inquiry. These are questions of identity, handwriting, quantity, value, weight, measure, time, distance, velocity, form, size, age, strength, heat, cold, sickness, and health, questions also concerning various mental and moral aspects of humanity, such as disposition and temper, anger, fear, excitement, intoxication, veracity, general character, and particular phases of character, and other conditions and things, both moral and physical, too numerous to mention. That the opinion of a witness as to whether a person under his observation was drunk or sober is admissi-

ble will hardly be doubted. On the same principle a witness who has observed some of the numerous victims of the drug habit may express his conclusions, based on observation, that the condition of a certain person was due to the influence of a drug. Arranged from *Miller v. Hamilton Brown Shoe Co.* (1911) 89 S. C. 530, 72 S. E. 397, Ann. Cas. 1913B, 106.

Readings: Nonexpert Opinion that One was under the Influence of a Drug.

1. Nonexpert Testified that a Person was under Influence of Morphine. *Burt v. Burt* (1897) 168 Mass. 204, 46 N. E. 622.
2. Witness must Know General Effect of Use of the Drug. *Rupe v. State* (1901) 42 Tex. Cr. R. 477, 61 S. W. 929.

Evidence—Testing the Knowledge of Expert Witness

An expert witness may be cross-examined the same as any other witness. Frequently one of the purposes of such cross-examination is to test his supposedly superior knowledge of the subject upon which he has assumed to supply expert testimony. Perhaps no better way of discovering a so-called expert's knowledge of a subject can be devised than to compare his knowledge with that of accepted authorities by means of cross-questions. In case of a doctor or a druggist purporting to give expert testimony, standard medical or pharmaceutical authorities should be used as a test.

Poison—When Questions of Negligence are Not Questions of Fact for the Jury

Questions of negligence and contributory negligence are, under most circumstances, questions of fact to be determined by the jury. In some cases the facts are so clear that it is not necessary to submit the question of negligence to the jury, but the court may direct a verdict for plaintiff or defendant as may be proper. In these cases, proof of the facts out of which the injury arose is deemed proof of negligence. Usually evidence of these facts is in writing or in some other form not susceptible of dispute. A Missouri case is in point: "If a manufacturer or dealer in drugs puts a label upon the article indicating that it is harmless, and the label is false and the article poisonous, then

as a matter of law, he is liable, as proof of the fact is proof of negligence, and it is not necessary to submit to the jury the question of whether such an act is negligence." *Darks v. Scudder-Gale Grocer Co.* (1910) 146 Mo. App. 246, 130 S. W. 430.

Readings: Questions of Fact for Jury in Poison Cases. Whether workman was negligent in leaving glass of muriatic acid exposed is question for the jury. *Neff v. Daniel* (1926) 102 N. J. Law, 422, 131 A. 900.

Poison—Testimony as to Analysis of Deceased's Stomach

In prosecutions for murder by poisoning, it is frequently necessary to have an analysis made of the contents of the deceased person's stomach. That testimony concerning the results of the analysis may be acceptable to the court, it must be shown that care has been exercised to prevent any tampering with the stomach; otherwise the analysis might be of little or no value. The proper care to be exercised was stated in a Missouri case as follows: "In order to admit testimony showing the result of the analysis it was necessary to satisfy the court of the identity of the stomach examined with that of Hutsell (deceased) and that it was in the same condition when examined as when removed from the body. It was not necessary that it should have been hermetically sealed so as to be inaccessible to anybody; it was not necessary to show that there was an entire absence of opportunity for anybody to tamper with it; it was only necessary to show the circumstances were such as to establish a reasonable assurance that it was the same and in the same condition." *State v. Smith* (Mo. Sup. 1920) 222 S. W. 455.

Expert Witness may Not Refuse to Testify without Additional Compensation

The fees of an ordinary witness are small. Suppose a chemist, druggist, or physician has been summoned as a witness, and when on the stand he is asked questions, the answers to which involve professional skill and knowledge, can such witness refuse to testify as an expert unless compensation in addition to ordinary witness fees are tendered him? The early English cases and a few American courts have held that the witness may refuse to testify until assured of extra compensation, and that

he will not thereby be in contempt of court, but the majority of American courts hold that he must testify. If called by the state or prosecution, a witness cannot demand extra fees when on the stand, because it is considered that certain duties are owed the government, and that every person must be available to assist the courts in the administration of justice. Usually if an expert is called by a party, other than the state, there is an agreement ahead as to what the fee shall be. If there has been no understanding as to compensation and the witness is already on the stand, he can be compelled to testify.

Readings: Expert Witness may be Compelled to Testify without Additional Compensation.

1. Reasons for the Rule Explained. *Ex parte Dement*, 53 Ala. 389, 25 Am. Rep. 611.
2. Expert's Fees. *Wigmore on Evidence* (2d Ed.) § 2203.
3. Compelling Expert Witness to Testify. *Pennsylvania Co. For Insurance on Lives and Granting Annuities v. City of Philadelphia* (1918) 262 Penn. 439, 105 A. 630, 2 A. L. R. 1573.

Witness Refusing to Testify may be Contempt of Court

Ordinarily when upon the stand a witness is expected to answer the questions put to him, and the refusal to testify or to answer proper questions is in contempt of court. If the question is not a proper one, it is not contempt to refuse to answer. The attorney should be able to inform the witness as to whether the question is a proper one. An obviously false or evasive reply to a question is equivalent to a refusal to answer. There are times when a witness may refuse to testify and still not be in contempt of court, as, for example, when the testimony is privileged or when such testimony would tend to incriminate the witness.

Reading: Witness Refusing to Testify as Contempt of Court. *Ex parte Cohen* (1894) 104 Cal. 524, 38 P. 364, 26 L. R. A. 423, 43 Am. St. Rep. 127.

Questions of Fact are for Jury

Case:

MORAN v. DAKE DRUG CO.

Supreme Court of New York, Trial Term, Monroe County, 1912.
134 N. Y. S. 995.

The plaintiff contended that he went to the defendant's drug store to get a headache remedy and called for triple bromide tablets, and that a clerk delivered to him certain tablets in a box. He noticed the clerk writing on the box, but did not read it at the time. The plaintiff took one of these tablets, shortly thereafter felt sick, and, upon going to another drug store, it was discovered that defendant's clerk had sold and delivered bichloride of mercury tablets, instead of triple bromide tablets.

Defendant's contention was that, while he sold and delivered to plaintiff the bichloride of mercury tablets, they were what plaintiff had called for.

Question: How was the defendant's negligence and plaintiff's freedom from negligence to be decided?

CLARK, J. I think the questions of defendant's negligence and plaintiff's freedom from negligence were for the jury. Even though plaintiff was alone in his statement that he called for triple bromide tablets and was disputed by defendant's clerk, still it was for the jury to say which one of these witnesses was entitled to credit. As to plaintiff's negligence, that was equally for the jury, for I suspect that the time has not yet come when if a man calls for a particular remedy at a drug store, and he fails to read any writing the clerk may put on the package, that it can be said as a matter of law that by such a failure the plaintiff is guilty of contributory negligence. All he was obliged to do was to act and do what a reasonably prudent man should do under similar circumstances, and whether or not plaintiff in this case did act as a reasonably prudent person under the circumstances, was for the jury.

Review of Moran v. Dake Drug Co.:

1. What facts were pleaded by the plaintiff as grounds for recovery?
2. What was the defendant's defense?
3. What questions of fact were raised by the pleadings?
4. What is contributory negligence?

5. Why is it necessary for the plaintiff to be free from negligence in order to recover?
6. Would the jury be compelled to believe one witness and discredit the other?
7. What circumstances would help the jury to determine which one to believe?
8. Was it negligence to fail to read the writing on the box?
9. Why do you test a question of negligence by what a reasonably prudent man should do under similar circumstances?
10. If there is just one witness on each side of a case, what facts will aid the jury in determining the case?

Opium Users Make Unreliable Witnesses

Justice Budge, writing an opinion for the Supreme Court of Idaho, gives the status of the drug addict as a witness in the following paragraph: "We believe it will be admitted that habitual users of opium or other like narcotics, become notorious liars. The habit of lying comes doubtless from the fact that the users of those narcotics pass the greater part of their lives in an unreal world, and thus become unable to distinguish between images and facts, between illusions and realities. * * * We do not mean to hold in this case that the fact that a witness is an habitual user of opium or morphine excludes his testimony, unless it is shown that he is mentally irresponsible as a result of the use of such drug when examined as a witness. But we do mean to hold that the habitual user of morphine, cocaine, and other like narcotics, which inevitably tend to impair the mind, destroy the memory and moral character of a witness may be shown for the purpose of affecting his credibility or the weight that should be given to his testimony." *State v. Fong Loon* (1916) 29 Idaho, 248, 158 P. 233, L. R. A. 1916F, 1198.

Expert Testimony—Effect of Morphine and Opium

Digest of Cases:

1. Expert testimony as to the effect of morphine upon the mind and memory of its user is admissible. *State v. Smith* (1918) 103 Wash. 267, 174 P. 9.

2. Expert testimony admitted to determine whether the sale of opium for smoking purposes by a druggist to a confirmed user of the drug is for a legitimate purpose. *Katzman v. Common-*

wealth (1910) 140 Ky. 124, 130 S. W. 990, 30 L. R. A. (N. S.) 519, 140 Am. St. Rep. 359.

3. Physician who tested the powder sold by defendant by tasting only was not qualified to testify that it contained cocaine. *Stadler v. People* (1915) 59 Colo. 159, 147 P. 658.

Jury Service

It is considered more or less of an honor to serve on a jury for the trial of cases. However, a case may continue for many days, during which time the jurors are kept from their usual vocations. A few classes of persons, on account of their peculiar public duties, are by some state statutes made exempt from jury service. Among those usually so exempted are doctors, druggists, lawyers, and government employees.

Statute: All persons registered under the provisions of this act and actively engaged in the practice of pharmacy shall be exempt from serving as jurors. Colo. C. L. 1921, § 4596.

Statute: All persons licensed under this chapter as pharmacists, or assistant pharmacists and actively engaged in the practice of their profession, shall be free and exempt from jury duty in all the courts of this state. Mo. Rev. St. 1919, § 4727.

Prosecution for Possession of Cocaine for Sale—Evidence of Character of House to Which Defendant was Taking the Cocaine

Case:

STATE v. SHIMOAKA.

Supreme Court of Washington, 1926. 141 Wash. 837, 251 P. 290.

A criminal prosecution for the unlawful possession of cocaine with intent unlawfully and feloniously to sell, furnish, and dispose of the same.

Question: In a prosecution for possessing cocaine for unlawful sale, is evidence as to the character of the house to which the accused was taking the drug admissible?

FULLERTON, J. The witness describing the place said it was a "Chinese club house," "what they call a tong house," with a large room on the lower floor where men congregated to play

games, while on the upper floor were sleeping rooms. We fail to see error in this. Certainly, we think the state was entitled to show the character of the place to which the appellant was going when in possession of the drugs as a part of the surrounding circumstances characterizing his acts at the time, which the jury were entitled to consider. [The conviction was sustained, and the sentence was to a term in the state penitentiary of not less than nine nor more than ten years.]

Review of State v. Shimoaka:

1. State why this was a criminal case.
2. What was the crime charged?
3. Why would the character of the house to which accused was going assist in determining the guilt or innocence of the accused?
4. Why is the prosecution spoken of as the "state"?
5. Why were the "surrounding circumstances" material?
6. Was this prosecution under a state or a federal statute?

Chemical Analysis Not Absolutely Necessary in Prosecution for Selling Cocaine

One Etta Butler had been convicted of unlawfully selling cocaine, based on the testimony of five habitual users of the drug, who were familiar with its effects, and who swore absolutely that they had bought this particular drug from the defendant. The testimony of the medical experts was conflicting and unsatisfactory. On the appeal, the question was raised whether the testimony of the habitual users of the drug was sufficient to sustain the verdict of guilty. The court declared that there is no hard and fast rule requiring that the nature of a substance should be proved by analysis, and not otherwise. In seeking the truth, the law looks to the highest and best evidence obtainable, but, in its absence, evidence of less probative value may be sufficient, especially where it is undisputed, and where it is admitted without objection. It does not appear that any of the five female witnesses mentioned had any chemical knowledge of the drug in question, but it does appear that they had the fullest and most unfortunate knowledge of its physical effects and of the consequences arising from its use, and they all swore positively and without objection that the drug was cocaine. The conviction sustained. *Butler v. State* (1914) 14 Ga. App. 446, 81 S. E. 370.

Review of Butler v. State:

1. Etta Butler had been convicted of what crime?
2. What testimony was introduced to convict her?
3. Why would the testimony of medical experts be conflicting on such questions?
4. What question was raised on appeal?
5. In cases of this kind, would it be a good rule to require that the nature of the substance be proved by analysis?

**Criminal Prosecution for Unlawful Sale of Morphine—
Evidence of Other Offenses**

Is it proper in prosecutions for the unlawful sale of drugs to put in evidence facts concerning other violations of the same kind committed by the accused? Such evidence is competent if it tends corroboratively or directly to establish the guilt of the particular crime charged. It tends to establish guilt if it discloses a motive, a criminal intent, guilty knowledge, or is a part of a common scheme or plan embracing two or more crimes so related that proof of one tends to prove the other. In a well-considered case, a licensed physician was convicted of the illegal sale of narcotic drugs to a habitual user, and evidence of other offenses was admitted, the court stating that, "It was competent for the state to introduce evidence of other sales of morphine to Chandler and of the sale of morphine to other drug addicts, in violation of the statute. Evidence of this character is admissible if it is part of one plan or scheme carried on by the defendant to willfully violate the law, or if it tends to show an inclination or predisposition to commit the offense charged. The evidence of other offenses received in this case was within the rule." *State v. Whipple* (1919) 143 Minn. 403, 173 N. W. 801.

Review of State v. Whipple:

1. Why would a prosecuting attorney desire to introduce facts concerning other similar crimes of the accused?
2. To be able to introduce such evidence must the violations have been of the same kind? Why?
3. Why does it tend to establish guilt if it discloses a motive, a criminal intent, guilty knowledge, or is part of a common scheme?
4. Why do they speak of the prosecution as the "state"?
5. Why should the prosecution be permitted to introduce evidence of the sale of morphine to other addicts by the same defendant?
6. What did evidence of these various sales tend to show?

Readings: Evidence of Other Offenses.

1. One in a Series of Similar Offenses. *State v. Curtis*, 127 Wash. 273, 220 P. 769.
2. May Prove Separate Sales Which Occurred within Two Years. *Holmes v. State*, 7 Ga. App. 570, 67 S. E. 693.
3. Evidence that Witness had before Bought Narcotics from Accused Held Admissible. *State v. Ball* (1929) 153 Wash. 316, 279 P. 735.

A Decoy Which Successfully Entrapped the Defendant*Case:***STATE v. LOVELL.**

Supreme Court of Kansas, 1928. 127 Kan. 157, 272 P. 666.

Federal narcotic agents gave one Farrow five marked dollar bills with which to purchase morphine from the defendant. Farrow met defendant in a restaurant and made the purchase. Farrow then went to the street and advised the federal agents and a police officer of the purchase. The defendant was arrested and searched, and the marked bills were found upon his person.

Question: Did the acts of the federal agents and the others acting with them amount to a conspiracy to create a criminal?

HOPKINS, J. There was evidence indicating that defendant was in the business of marketing narcotics, and what appears to have happened was that the government agents set a "decoy", which successfully entrapped the defendant. The court in *State v. Roberts*, 95 Kan. 280, 147 P. 828, approved the use of detectives in procuring testimony, and there appears no good reason to change the rule.

Review of State v. Lovell:

1. Why were federal agents co-operating with state officers?
2. What "decoy" was used?
3. Is this a state case or a federal case?
4. What is meant by "conspiracy to create a criminal"?
5. Was the entrapment considered lawful?
6. Why did the court consider this a proper manner in which to secure the desired testimony?

7. Was the defendant induced to commit a crime which otherwise would not have been committed?

Expert Testimony—Opinion of Medical Experts on Future Effects of Poison

Quite often, in an action for damages for injury caused by poison, it becomes advantageous to establish the probable future effects of the poison on the injured person. In a leading case, the fact that the plaintiff had been injured by taking bichloride of mercury tablets had been sufficiently established, and then the opinion of medical experts on the future effects and probable duration of the injuries was held admissible. Justice Clark gave the reasons as follows: "There must be some way whereby a party thus injured can establish his damages, and I do not know of any better way to do it in a case of this character than by permitting medical experts to give their opinion as to future effects of such poison, when such testimony is based upon facts which have been established in the case. * * * The fact that plaintiff's stomach had been injured by taking the bichloride tablet had been sufficiently established, and, that being so, it seems that it was quite proper to receive evidence as to the effect and probable duration of the injuries." *Moran v. Dake Drug Co.* (Sup. 1912) 134 N. Y. S. 995.

Readings: Opinion Evidence as to Future Consequences of Injury. Admissibility of Opinion Evidence as to Future Consequences of Injury, Such as Permanency, Pain, and Suffering. *Cross v. City of Syracuse* (1911) 200 N. Y. 393, 94 N. E. 184, 21 Ann. Cas. 324.

Use of Medical Expert as Witness in Poison Case

Case:

BOSWELL v. STATE.

Supreme Court of Georgia, 1901. 114 Ga. 40, 39 S. E. 897.

The accused was placed on trial upon an indictment charging him with the offense of poisoning a well, he was convicted, and excepted. The prosecution introduced a physician who testified that in his opinion bluestone was a poisonous substance, but upon cross-examination stated that he had never had any practical

experience with cases of poisoning by bluestone, but derived his information on the subject solely from medical books dealing with the subject of poisons.

Question: Was it proper to admit the testimony of the medical expert when his opinion was based upon information obtained from books solely?

Held: The evidence was objected to upon the ground that it was hearsay, and that an expert should not be allowed to testify as to any matter that did not come within the range of his own experience. Books of science and art are not admissible in evidence to prove opinions of experts therein expressed. But, notwithstanding the inadmissibility of the books, the opinions contained therein may come to the jury through the mouth of an expert witness.

Review of Boswell v. State:

1. What was the offense charged?
2. What objection was raised as to the testimony of the physician?
3. What facts were brought out on the cross-examination?
4. What was the question involved?
5. Why was the opinion of the witness admitted when based upon books of science, when the books could not be admitted to prove the opinion of the author?
6. What is meant by a "medical expert"?
7. What is hearsay evidence?

Death Caused by Poison—Proof of Corpus Delicti

Before a person can be convicted of a crime, it must be established that the crime has been committed. The phrase "corpus delicti" is the term used in criminal law to designate the body of the crime charged or the fact that a crime has been committed. In a few cases in homicide, the term has been improperly used to designate the body itself. It is not always possible for the prosecution to produce the body of the deceased at the trial, as it may have been burned, thrown overboard at sea, or otherwise destroyed, but it is always necessary to prove the corpus delicti.

In homicide cases two fundamental facts are necessary—first, the fact of the death; and, second, the criminal agency of some

person as the cause. The burden of proof rests upon the prosecution to prove the corpus delicti, which may be done either by direct evidence or by presumptive evidence of an irresistible kind. When circumstantial evidence is depended upon to establish the fact of the crime, it must be clear and convincing. As a general rule, an extrajudicial confession of the accused is not sufficient proof unless substantiated by other corroborative evidence. In poison cases, it having been established that death was caused by the administration of poison, it then becomes necessary to prove that the poison was administered by the accused.

Readings: Proof of Corpus Delicti.

1. Proof of the Corpus Delicti in Poisoning Cases. 45 Central Law Journal, 72-76.
2. Proof of Corpus Delicti is Necessary. *State of Ohio v. Knapp* (1904) 70 Ohio St. 380, 71 N. E. 705, 1 Ann. Cas. 819.

Drug Addict—Confession of Crime under Promise of Drug

It is a well-known fact that a drug addict when deprived of the drug upon which he has become dependent will do almost anything to secure a supply of it. In a New Mexico case, the defendant who was a drug addict was almost desperate for a dose of his favorite narcotic. Under promise of some of it he made a confession of having committed a crime and told the details. The confession was introduced in evidence against him and it was held admissible on the ground that the promise of a collateral benefit or boon not relating to immunity from consequences of the crime is not sufficient to render a confession induced thereby inadmissible as involuntary. *State v. Woo Dak San* (1930) 35 N. M. 105, 290 P. 322.

Drug Addict as Witness

There are a few states in which evidence may be admitted for the purpose of discrediting a witness by showing that he is in the habit of using opium, morphine, or a similar drug, and that the use of such drug has had certain effects on the physical and mental condition of the user. However, the general rule is that such evidence is inadmissible unless it is proved that the witness was

under the influence of the drug at the time of the occurrence as to which he testifies or at the time of the trial, or that his memory or mental powers are affected by the drug habit.

In *State v. Gleim* (see readings), it was held "proper to refuse to permit a witness to be asked, for the purpose of affecting her credibility, whether she was addicted to the morphine habit, unless it was intended to show that she was under the influence of the drug at the time the events happened about which she was testifying, or that her powers of recollection were impaired thereby."

Evidence that the Prosecuting Witness was under the Influence of Morphine

Case:

STATE v. SMITH.

Supreme Court of Washington, 1918. 108 Wash. 267, 174 P. 9.

E. M. Smith was convicted of selling morphine without a physician's prescription. The evidence of the state tended to show that the prosecuting witness was under the influence of morphine at the time of the alleged sale to her by the defendant and at the time she was arrested and also when she related the facts to the officers.

Question: Should the defendant be allowed to prove by expert testimony the effect of the drug upon the mind and memory of such user?

MACKINTOSH, J. The evidence of the state having shown that the prosecuting witness, a sporting woman, was under the influence of morphine at the time of the alleged sale to her by the appellant, and that she was arrested then by an officer to whom she related her story, the defense was entitled to prove, by expert testimony, the effect of the drug upon the mind and memory of its user. *Anderson v. State*, 65 Tex. Cr. R. 365, 144 S. W. 281; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730.

While testimony is admissible showing the character of or effect of the use of drugs upon a witness as affecting her credibility, it is not proper for the court to violate the constitutional prohibition against commenting upon the evidence by instructing the jury that it should regard the testimony of any class of witnesses with caution or suspicion.

For the errors discussed the judgment is reversed.

Review of State v. Smith:

1. Why was this a criminal case?
2. What did the evidence of the state tend to show?
3. State the question.
4. Why did the appellant wish to prove the effect of the drug on the mind and memory of the user?
5. At what critical times was the prosecuting witness under the influence of the drug?

Readings: Discrediting a Witness by Evidence that He is a Drug User.

1. Drug Users in Court. 7 J. Crim. Law, 903-906.
2. State v. Gleim (1895) 17 Mont. 17, 41 P. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655, 10 Am. Cr. Rep. 46.
3. Credibility of Witness Affected by Use of Drugs. State of Iowa v. Prentice (1921) 192 Iowa, 207, 183 N. W. 411, 15 A. L. R. 904.
4. Proof of Drug Habit to Discredit Witness. State v. Schuman (1915) 89 Wash. 9, 153 P. 1084, Ann. Cas. 1918A, 633.

Demonstrative Evidence

When a person is put on trial for a crime, any instruments, bottles, packages, or other devices used in the commission of the crime and taken from the accused by an officer upon his arrest may be put in evidence on the trial of the accused person. Even though these articles may have been taken by force or secured by an illegal search, such demonstrative evidence will be admitted. Articles may be introduced in evidence only when properly identified and when no substantial change has been made in them which might cause them to be misleading.

Readings: Bottles, Instruments, and Drugs Admitted in Court. Bottle of Cocaine Admitted in Evidence though Taken by Force. State v. Sutter (1912) 71 W. Va. 371, 76 S. E. 811, 43 L. R. A. (N. S.) 399.

PART II

FEDERAL STATUTES AND REGULATIONS

CHAPTER 1

HARRISON ANTI-NARCOTIC ACT

Harrison Narcotic Act—Names Applied to It—Where Found

The original Harrison Anti-Narcotic Act (December 17, 1914) was entitled "An Act to Provide for Registration of, with Collectors of Internal Revenue, and to Impose a Special Tax upon all Persons, Who Produce, Import, Manufacture, Compound, Deal in, Dispense, Sell, Distribute, or Give Away Opium or Coca Leaves, their Salts, Derivatives, or Preparations, and for Other Purposes."

The courts in construing the act have applied various names to it, such as the Harrison Act, Harrison Narcotic Act, Harrison Anti-Narcotic Act, Harrison Drug Act, and the Opium Act of 1914.

This statute was composed of twelve sections, and may be found in 38 United States Statutes at Large, 785. Section 11, which provided an appropriation to put it into effect, is usually not printed with the other sections.

The act has been amended several times, and these amendments may be found in the following places:

(a) Amendment of February 24, 1919, in 40 U. S. Statutes at Large, 1130, c. 18, § 1006.

(b) Amendment of November 23, 1921, in 42 U. S. Statutes at Large, 298, c. 136, § 1005.

(c) Amendment of June 2, 1924, in 43 U. S. Statutes at Large, 328, c. 234, § 705.

(d) Amendment of February 26, 1926, in 44 U. S. Statutes at Large, 96, c. 27, § 703.

(e) Amendment of May 29, 1928, in 45 U. S. Statutes at Large, 867, c. 852, § 432.

(f) The act as it now stands is part of the internal revenue statute, and so is included in the New Internal Revenue Code of 1939, 26 U.S.C.A. § 1 et seq. Under the above-named title in the United States Code Current Service, 1939, No. 1, may be found the provisions of this statute, classified and arranged under the sections as they appear in the New International Revenue Code.

A Revenue Act

The Harrison Anti-Narcotic Act is in form and classification a revenue measure, but in its operation it affects the moral and social welfare of the people. The states were not able adequately to deal with the narcotic problem under their police power, so the federal government has undertaken to control as many phases of the situation as possible.

Power of Congress to Pass and Enforce Narcotic Statutes

The right of the federal government to regulate and control this problem is found, (a) in the power of Congress to carry out treaty provisions, (b) power of Congress to regulate foreign and interstate commerce, and (c) power of Congress to tax. Under a treaty made with China in 1887, Congress prohibited the importation of opium by Chinese subjects and the traffic in opium in China by Americans. Also under its power to regulate commerce, Congress prohibited the importation of opium into this country for purposes other than medicinal. And in 1890 Congress, by virtue of its taxing power, placed a tax on manufactured opium, and restricted the right of manufacture to American citizens.

Anticipated Benefits to be Derived from Enforcement of the Act

Although, as has been stated in a previous paragraph, the Anti-Narcotic Act is in form a revenue act, the enforcement of its provisions is expected to be productive of a number of social and moral benefits. These anticipated results are: (a) The restriction of the distribution of nar-

cotics to medicinal uses; (b) the careful and proper supervision of the traffic in such drugs; (c) a minimizing of the spread of drug addiction; and (d) the accomplishment of certain moral benefits.

Duties Imposed

The duties which the Anti-Narcotic Act imposes upon the druggist are plain and explicit, and no druggist who reads its provisions carefully need be in any doubt as to what the law requires of him in this respect. It is of interest to note in this connection that the number of druggists prosecuted under this act is small in comparison with the number of physicians, drug peddlers, and others having possession of the drug who have been brought to trial. In the cases recorded there seems to be no complaint that the statute is not clear as to precautions which the druggist must take to protect himself in the sale of such drugs.

It is a criminal statute and provides punishment for infractions.

Constitutionality

The act has been productive of much litigation, and its constitutionality has been attacked from every angle. It has been held valid as a revenue measure bringing the traffic of such drugs under proper supervision, irrespective of the fact that the purpose of Congress was to suppress and regulate the drug habit. Attempts to prove that it invades the police power of the several states have failed to prove the unconstitutionality of the statute.

Readings: Comments, Explanations, and Criticisms of Harrison Act.

1. The Narcotic Problem—Federal Control. 13 Cornell Law Quarterly, 627-630.
2. What is the Constitutional Justification for the Harrison Anti-Narcotic Law? 64 U. Penn. Law Rev. 502-505.
3. The Harrison Narcotic Act. 6 Va. Law Rev. 534-540.
4. The Harrison Anti-Narcotic Act and the Limitations of the Taxing Power. 21 Ill. Law Rev. 264-269.

5. The Slavery of the Anti-Narcotic Acts. 19 Law Notes, 164.
6. Straining a Federal Power (to Hold the Act Constitutional). 32 Law Notes, 81, 82.
7. Practice and Procedure under the Harrison Act. Hopkins' Federal Criminal Law, 1927, 517-543.
8. Liability of Druggist under the Harrison Act. *Linder v. United States of America*, 1925, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229.

The New Internal Revenue Code

The Seventy Sixth Congress passed an act to consolidate and codify the revenue laws of the United States. One of the consequences of this act was a complete rearrangement of the section numbers of the existing narcotic laws. This new compilation is known as the Internal Revenue Code or I. R. C. It includes all general laws of the United States and all parts of such laws, relating exclusively to internal revenue, in force on the second day of January, 1939. Both laws of a permanent nature, and those temporary, if embraced in the Internal Revenue, are included.

The only part of this I.R.C. to be treated in this chapter is that relating to narcotics.

Purposes of New Arrangement and Classification

The Act of Congress providing for the new Internal Revenue Code states that "the arrangement and classification of the several provisions of the Internal Revenue Title have been made for the purpose of a more convenient and orderly arrangement of the same." 26 U.S.C.A.

This new classification makes necessary a new arrangement of the Chapter on Narcotics in conformity with that of the code.

Since the narcotic laws are now considered as tax measures the prior title, "Harrison Narcotic Laws" has largely lost its significance.

NARCOTICS

Internal Revenue Code, Chapter 23, Sections 2550-2565

SUBCHAPTER A—OPIUM AND COCA LEAVES

Scope of section 2550

This is an internal revenue, commodity tax. The section sets forth methods of tax computation, procedure, forms of records and returns and other similar matters.

Statute

§ 2550. Tax

(a) **Rate.** There shall be levied, assessed, collected, and paid upon opium, coca leaves, any compound, salt, derivative, or preparation thereof, produced in or imported into the United States, and sold, or removed for consumption or sale, an internal revenue tax at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall be in addition to any import duty imposed on the aforesaid drugs.

(b) **By whom paid.** The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder.

(c) **How paid**

(1) **Stamps.** The tax imposed by subsection (a) shall be represented by appropriate stamps, to be provided by the Secretary.

(2) **Assessment**

For assessment in case of omitted taxes payable by stamp, see section 3311 and section 3640, I.R.C.

(3) **Other methods.** Whether or not the method of collecting any tax imposed by this section or by section 3220 is specifically provided therein, any such tax may, under regulations prescribed by the Secretary, be collected by stamp, coupon, serial-numbered ticket, or such other reasonable device or method as may be necessary or helpful in securing a complete and prompt collection of the tax.

All administrative and penalty provisions of subchapters A, B and C of chapter 11, in so far as applicable, shall apply to the collection of any tax which the Secretary determines or prescribes shall be collected in such manner. 26 U.S.C.A. § 2550.

(4) Cross reference

For authority of the Secretary to delegate such powers and duties, see subchapter D.

(d) Registration and special tax

For requirements on importers, manufacturers, producers, dealers and practitioners to register and pay special tax, see part V of subchapter A of chapter 27.

Review of section 2550:

- (a) 1. The tax is levied on what commodities?
2. What is the amount of the tax?
- (b) 1. By whom shall the tax be paid?
- (c) 1. How must the tax be paid?
2. Who may prescribe regulations?

Readings on section 2550:

- 1. Historical note on section 2550, 26 U.S.C.A. § 2550.
- 2. This section imposing a stamp tax on certain drugs does not invade reserved powers of states. *Alston v. U. S.*, 1927, 274 U.S. 289, 47 S.Ct. 634, 71 L.Ed. 1052.
- 3. Violation of regulations facilitating collection of tax is offense, without showing government was deprived of revenue. *Bush v. U. S.*, C.C.A.1927, 16 F.2d 709.
- 4. Carrying of cocaine on the person held not to subject the vehicle in which such person was riding to forfeiture. *Cadillac Automobile Motor No. 61-D-476 v. U. S.*, C.C.A., 7 F.2d 102.
- 5. The Harrison Narcotic Act must be interpreted as a revenue act only, and not as an act regulating medicine. *United States v. Anthony*, D.C.Cal. 1936, 15 F.Supp. 553.

Scope of section 2551

Persons manufacturing and dealing with certain narcotic preparations are conditionally exempted by this section

from liability under other sections of the Act. Such persons are, nevertheless, required to register, and are subject to other requirements as stated in the statute.

Preparations containing any quantity of cocain or pantopan are not included in these exemptions.

Exemption from the stamp tax and other requirements as to narcotics of standards given in 2550 is only available for those preparations to be used as medicine. Only such quantities may be disposed of to the same person as will insure its use for medicinal purposes only, and not for purposes of evasion of the tax.

Statute

§ 2551. Exemptions

(a) **Preparations of limited narcotic content.** The provisions of this subchapter and part V of subchapter A of chapter 27 shall not be construed to apply to the manufacture, sale, distribution, giving away, dispensing, or possession of preparations and remedies which do not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce; or to liniments, ointments, or other preparations which are prepared for external use, only, except liniments, ointments, and other preparations which contain cocaine or any of its salts or alpha or beta eucaine or any of their salts or any synthetic substitute for them: *Provided*, That such remedies and preparations are manufactured, sold, distributed, given away, dispensed, or possessed as medicines and not for the purpose of evading the intentions and provisions of this subchapter and said part V: *Provided further*, That any manufacturer, producer, compounder, or vendor (including dispensing physicians) of the preparations and remedies mentioned in this section lawfully entitled to manufacture, produce, compound, or vend such preparations and remedies, shall keep a record of all sales, exchanges, or gifts of such preparations and remedies in such manner as the Secretary shall direct. Such record shall be preserved for a period of two years in such a way as to be readily accessible to inspection by any officer, agent or employee of the Treasury Department

duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officers named in section 2556, and every such person so possessing or disposing of such preparations and remedies shall register as required in section 3221 and, if he is not paying a tax under section 3220, he shall pay a special tax of \$1 for each year, or fractional part thereof, in which he is engaged in such occupation, to the collector of the district in which he carries on such occupation as provided in part V of subchapter A of chapter 27.

(b) **Decocainized coca leaves.** The provisions of this subchapter and part V of subchapter A of chapter 27 shall not apply to decocainized coca leaves or preparations made therefrom, or to other preparations of coca leaves which do not contain cocaine.

(c) **Government and state officials**

(1) **Stamping drugs.** Officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business described in part V of subchapter A of chapter 27, shall not be required to stamp the drugs mentioned in section 2550 (a), as hereinafter prescribed, but their right to this exemption shall be evidenced in such manner as the Secretary may by regulations prescribe. 26 U.S.C.A. § 2551.

(2) **Registration and payment of tax**

For exemption of officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments from the requirements as to registration and the payment of special taxes, see subsection (b) of section 3222, I.R.C.

(3) **Cross reference**

For authority of the Secretary to delegate such powers and duties, see subchapter D.

Review of section 2551:

- (a) 1. Name the preparations and remedies for which exemptions are provided.
2. What are the provisions concerning liniments and ointments?
3. Who shall keep a record of sales, exchanges, and gifts of such preparations and remedies?

4. What facts must be embodied in this record?
5. How long shall the record be preserved?
6. Who may inspect the record?
7. Who must pay the fee of one dollar?
- (b) 1. Why do these provisions not apply to the drugs mentioned in (b)?
- (c) 1. What officials are not required to stamp the drugs?
2. How do they establish their right to exemption?

Records of Exempt Preparations of Section 2551

"Every manufacturer, producer, compounder, or vendor (including dispensing physicians), of exempt preparations shall record all sales, exchanges, gifts, or other dispositions, the entries to be made at the time of delivery. Separate records shall be kept of dispositions to registrants and of dispositions to consumers. The record of dispositions to registrants shall show the name, address, and registry number of the registrant to whom disposed, the name and quantity of the preparation, and the date upon which delivery to the registrant, his agent or a carrier is made. The record of dispositions to consumers shall show the name of the recipient, his address, the name and quantity of the preparation, and the date of delivery.

"Forms are not furnished for the keeping of these records, but the records shall be in the following form:

Form of record of dispositions to registrants

Date	Registration No. of recipient	Name of recipient	Address	Name of preparation	Quantity
.....
.....
.....

Form of record of dispositions to consumers

Date	Name of recipient	Address	Name of preparation	Quantity
.....
.....
.....

"In the case of manufacturers of or dealers in exempt preparations who are also registered as manufacturers of or dealers in taxable drugs in Class I or II, the foregoing requirement as to records of dispositions to registrants shall be deemed to be complied with, if all such dispositions are evidenced by vouchers or invoices containing all the required information and such vouchers or invoices are kept in a separate file arranged chronologically (Joint Narcotic Regulations, No. 5, Article 185)."

Standard of Exemption of Section 2551

"Preparations designed for or capable of internal use to be exempt shall not contain more than two grains of opium, or more than one-fourth of a grain of morphine, or more than one-eighth of a grain of heroin, or more than one grain of codeine, or any salt or derivative of any of them in one fluid ounce, or, if a solid or semisolid preparation, in one avoirdupois ounce. The preparation shall contain active medicinal drugs other than narcotics in sufficient proportion to confer upon the preparation valuable medicinal qualities other than those possessed by the narcotic drug alone. Use for aural, nasal, ocular, rectal, urethral, or vaginal purposes is not regarded as external use and, therefore, preparations manufactured or used for such purposes containing more than the percentages of narcotic drugs as above indicated are not within the exemption.

"There is no limitation upon the percentage of narcotic drugs external preparations may contain. In order to be within the exemption a preparation for external use, containing more than the maximum percentage of narcotic drugs above specified, shall contain ingredients rendering

it unfit for internal administration. (Joint Narcotic Regulations, No. 5, Article 181)."

Readings on section 2551:

1. For historical note, see 26 U.S.C.A. § 2551.
2. Not invalid as invading police power of state. *Watson v. U. S.*, C.C.A.Idaho, 1926, 16 F.2d 52.
3. Based on humanitarian grounds. *Oliver v. U. S.*, C.C.A.W.Va., 1920, 267 F. 544.
4. "Preparation and remedies" relate to actual medicinal preparations and remedies. *Stetson v. U. S.*, C.C.A.Mich. 1919, 257 F. 689.
5. "Or other preparations," defined. *Lowe v. Farbwerke-Hoechst Co.*, N.Y. 1917, 240 F. 671, 153 C. A. 469.
6. Dispensing large and unusual quantities of drugs, a violation. *U. S. v. Curtis*, D.C.N.Y. 1916, 229 F. 288.
7. Evidence of Physician's issuance of laudanum prescriptions other than those named in the indictment charging him with unlawful sales held inadmissible. *MacLafferty v. U. S.*, C.C.A.Wash. 1935, 77 F.2d 715.

Scope of section 2552

This tax is paid by affixing stamps of proper value to each package containing a taxable unit. Containers having removable closing devices must be sealed by the stamp. Only persons registered in Class I, that is, importers, manufacturers, producers and compounders, shall be furnished with stamps. Stamps may be transferred only to a successor in business registered in Class I, but unused stamps may be redeemed.

Statute

§ 2552. Stamps

(a) **Affixing.** The stamps provided in subsection (c) (1) of section 2550 shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof.

(b) **Other laws applicable.** All the provisions of law relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal revenue laws shall, in so far as necessary, be extended and made to apply to the stamps provided in subsection (c) (1) of section 2550. 26 U.S.C.A. § 2552.

(c) **Cross reference**

For general provisions relating to stamps, see part I of subchapter A of chapter 28.

Review of section 2552:

(a) 1. How shall the stamps be affixed?

(b) 1. What other laws are applicable to the stamp provisions?

Scope of section 2553

Section 2553 makes it unlawful for anyone, even a registrant, to sell, distribute, or dispense except in and from a properly stamped package. Absence of appropriate stamps is made evidence of a violation.

Exception is made of registered practitioners so as to protect a person who has in his possession any of the drug obtained from the dealer on a proper prescription, and which is labeled in accordance with the statute.

There is also exemption for properly registered physicians, dentists and veterinary surgeons in dispensing or administering the forbidden drug to patients.

Statute

§ 2553. Packages

(a) **General requirement.** It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the drugs mentioned in section 2550 (a) except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps for any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing any of the aforesaid drugs by any person who has not registered and paid

ARTHUR DRUGS

special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

(b) **Exceptions in case of registered practitioners.** The provisions of subsection (a) shall not apply—

(1) **Prescriptions.** To any person having in his or her possession any of the drugs mentioned in section 2550 (a) which have been obtained from a registered dealer in pursuance of a prescription, written for legitimate medical uses, issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3221; and where the bottle or other container in which such drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, serial number of prescription, name and address of the patient, and name, address, and registry number of the person writing said prescription; or

(2) **Dispensations direct to patients.** To the dispensing, or administration, or giving away of any of the aforesaid drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subchapter of the drugs so dispensed, administered, distributed, or given away. 26 U.S.C.A. § 2553.

Review of section 2553:

- (a)
 1. What acts are made unlawful?
 2. What is made prima facie evidence of a violation of this law?
 3. What facts are made prima facie evidence of liability to pay this special tax?
- (b)
 1. Why do these provisions not apply to prescriptions?
 2. What facts must be proved in relation to the prescription?
 3. What facts must appear on the bottle or container in which such drug is put up?
 4. State the requirements of the statute when the drug passes directly from the practitioner to the patient.
 5. What record must be kept?
 6. Why grant these exemptions to practitioners?

Readings on section 2553:

1. This section prevents dealing in narcotics on which no tax has been paid. *Flowers v. U. S.*, C.C.A. Neb.1936, 83 F.2d 78.
2. "In" and "from" original stamped packages explained. *Hale v. U. S.*, C.C.A.W.Va.1937, 89 F.2d 578.
3. Purchasing, selling and dispensing morphine not in original package. *Martin v. U. S.*, C.C.A.Tenn. 1927, 20 F.2d 785.
4. This section is not restricted to persons required to register. *Ng Sing v. U. S.*, C.C.A.Cal.1926, 8 F.2d 919.
5. This is an indictable offense, though statute imposes no penalty. *Stubbs v. U. S.*, C.C.A.Wash. 1924, 1 F.2d 837.
6. Physician may treat drug addicts by using small quantities of morphine. *Linder v. U. S.*, Wash. 1925, 268 U.S. 5, 45 S.Ct. 446, 69 L.Ed. 819, 39 A.L.R. 229.
7. Physician may issue prescription for narcotic drug. *Aiton v. U. S.*, C.C.A.Ariz.1925, 3 F.2d 992.
8. Successive sales constitute distinct offenses, however closely sales may follow each other. *Blockburger v. U. S.*, Ill.1932, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306.

Scope of section 2554

This section states the requirements concerning written order forms, how and by whom they may be procured, and the procedure necessary for obtaining such forms.

*Statute***§ 2554. Order forms**

(a) **General requirement.** It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary.

(b) **Exception in case of Virgin Islands.** The President is authorized and directed to issue such Executive orders as will permit those persons in the Virgin Islands of the United States lawfully entitled to sell, deal in, dispense, prescribe, and distribute the drugs mentioned in section 2550 (a), to obtain said drugs from persons registered under section 3221 within the continental United States for legitimate medical purposes, without regard to the order forms described in this section.

(c) **Other exceptions.** Nothing contained in this section, section 2563, or section 2564 shall apply—

(1) **Use of drugs in professional practice.** To the dispensing or distribution of any of the drugs mentioned in section 2550 (a) to a patient by a physician, dentist, or veterinary surgeon registered under section 3221 in the course of his professional practice only: *Provided*, That such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in section 2556.

(2) **Prescriptions.** To the sale, dispensing, or distribution of any of the drugs mentioned in section 2550 (a) by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under section 3221: *Provided, however*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: *And provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(3) **Exportation.** To the sale, exportation, shipment, or delivery of any of the drugs mentioned in section 2550 (a) by any person within the United States or any Territory

or the District of Columbia or any of the insular possessions of the United States to any person in any foreign country, regulating their entry in accordance with such regulations for importation thereof into such foreign country as are prescribed by said country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials. To the sale, barter, exchange, or giving away of any of the drugs mentioned in section 2550 (a) to any officer of the United States Government or of any State, Territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, Territorial, district, county, or municipal or insular hospitals or prisons.

(d) Preservation. Every person who shall accept any order required under subsection (a), and in pursuance thereof shall sell, barter, exchange, or give away any of the drugs mentioned in section 2550 (a), shall preserve such order for a period of two years in such a way as to be readily accessible to inspection by any officer, agent, or employee of the Treasury Department duly authorized for that purpose, and the State, Territorial, District, municipal, and insular officials named in section 2556.

(e) Duplicates. Every person who shall give an order as provided in this section to any other person for any of the drugs mentioned in section 2550 (a) shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the Secretary, and in case of the acceptance of such order, shall preserve such duplicate for said period of two years in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials mentioned in section 2556.

(f) Supply. The Secretary shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors for sale by them to those persons who shall have registered and paid the special tax as required by sections 3221 and 3220 in their districts, respectively; and no collector shall sell any

of such forms to any persons other than a person who has registered and paid the special tax as required by said sections in his district. The price at which such forms shall be sold by said collectors shall be fixed by the Secretary but shall not exceed the sum of \$1 per hundred. Every collector shall keep an account of the number of such forms sold by him, the names of the purchasers, and the number of such forms sold to each of such purchasers. Whenever any collector shall sell any of such forms, he shall cause the name of the purchaser thereof to be plainly written or stamped thereon before delivering the same; and no person other than such purchaser shall use any of said forms bearing the name of such purchaser for the purpose of procuring any of the aforesaid drugs, or furnish any of the forms bearing the name of such purchaser to any person with intent thereby to procure the shipment or delivery of any of the aforesaid drugs.

(g) Unlawful use. It shall be unlawful for any person to obtain by means of said order forms any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof by him in the conduct of a lawful business in said drugs or in the legitimate practice of his profession. 26 U.S.C.A. § 2554.

(h) Cross references

(1) Issuance in Puerto Rico and the Philippine Islands

For issuance of order forms in Puerto Rico and the Philippine Islands, see subsection (a) of section 2564.

(2) Transfer of duties

For the authority of the Secretary to delegate such powers and duties, see subchapter D.

Review of section 2554:

- (a)
 1. What acts are made unlawful?
 2. To whom must the written order be addressed?
 3. Where may the proper form be secured?
- (b)
 1. State the exception in relation to the Virgin Islands.
- (c)
 1. What professional men are excepted?
 2. State the exception.
 3. What record must be kept?
 4. What facts must be contained in the record?
 5. State the provision when drugs are dispensed to a patient.

6. *How long must the record be preserved?*
7. *State the law in relation to prescriptions.*
8. *What facts must appear on the prescription?*
9. *Who preserves the prescription?*
10. *State the law in relation to exportation.*
11. *What are the exceptions in relation to government and state officials?*
- (d) 1. *What orders must be preserved?*
2. *Who may have access to these orders?*
- (e) 1. *What duplicate forms must be made?*
- (f) 1. *By whom must forms be prepared?*
2. *Who may secure forms?*
3. *What record must the collector keep of such forms?*

Some Specific Provisions of Section 2554

Order forms are issued and executed in duplicate, one of which may be a carbon sheet. Their sole use is in the disposal of narcotic drugs and preparations to registered persons, but not as prescriptions.

The order forms constitute part of the permanent record of the registrant who fills them, and must be kept on file for two years for inspection purposes.

Order forms should be prepared in a sufficiently permanent manner to guard against subsequent alteration.

The purchaser must insert the full and exact date when the form was made as well as the number of items ordered. The purchasing registrant must sign with ink or indelible pencil official narcotic order forms, using the same signature as on the application for registration. A printed or stamped signature is not sufficient; it must be in his own hand writing.

A purchaser must be registered under the Act, at the location, in the class and under the registry number specified by the collector, at the time the order is submitted. He must also be qualified for the fiscal year in which the goods are received. Care must be exercised in listing all items according to regulations propounded. All order forms returned because not properly prepared must be kept on file, and a new form made out if the goods are still wanted. In case a registrant discontinues business or

changes his location, he must return for cancellation all unused order forms.

Readings on section 2554:

1. Not invalid as a revenue measure, though its chief purpose is to control distribution, by empowering physicians exclusively to distribute the drug only as medicine. *U. S. v. Rosenberg*, D.C.N.Y.1918, 251 F. 963.
2. Prohibiting retail sales of morphine to a person not having a prescription or order blank, is not unconstitutional. *Webb v. U. S.*, Tenn.1919, 249 U.S. 96, 39 S.Ct. 217, 63 L.Ed. 497.
3. Druggists must not sell when they know that buyer is seeking narcotic on a bogus prescription. *Smith v. U. S.*, C.C.A.Mo.1923, 284 F. 673.
4. Person to whom the statute applies. *Stokes v. U. S.*, C.C.A.Mo.1930, 39 F.2d 440.
5. Failure to preserve duplicate order. *U. S. v. Gaag*, D.C.Mont.1916, 237 F. 728.
6. Exception of physicians. *Harris v. U. S.*, C.C.A.N.Y.1921, 273 F. 785.
7. Filling a prescription issued to an addict. *Friedman v. U. S.*, C.C.A.Tenn.1919, 260 F. 388.
8. Prescription must be issued in good faith. *Towbin v. U. S.*, C.C.A.Colo.1938, 93 F.2d 861.
9. For many cases, see 26 U.S.C.A. § 2554.

Scope of section 2555

This section provides for the keeping of such records and accounts as the Commissioner of Narcotics may require of all special narcotic tax payers.

Provision is made for the keeping of books and making of monthly reports by importers, manufacturers and wholesale dealers.

The definite requirements are very clearly set forth in this section.

Statute

§ 2555. Records, statements, and returns

(a) **General requirement.** Every person liable to any tax imposed by this subchapter or section 3220, or for the

collection thereof, shall keep such records, render under oath such statements, make such returns, and comply with such rules and regulations, as the Secretary may from time to time prescribe.

(b) Books and monthly returns of importers, manufacturers, and wholesale dealers. Importers, manufacturers, and wholesale dealers shall keep such books and records and render such monthly returns in relation to the transactions in the aforesaid drugs as the Secretary may by regulations require.

(c) Returns by registrants of drugs received

(1) Requirement. Any person who shall be registered in any internal revenue district under the provisions of section 3221 shall, whenever required so to do by the collector of the district, render to the said collector a true and correct statement or return, verified by affidavit, setting forth the quantity of the aforesaid drugs received by him in said internal revenue district during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine; the names of the persons from whom the said drugs were received; the quantity in each instance received from each of such persons, and the date when received. 26 U.S.C.A. § 2555.

(2) Cross reference

For authority of the Secretary to delegate such powers and duties, see subchapter D.

Review of section 2555:

- (a) 1. What duties may be imposed on persons liable to this tax?
- (b) 1. What books must be kept?
2. State the authority of the Secretary.
- (c) 1. What reports may the collector of the district require?
2. What is an affidavit?

Scope of section 2556

This section specifies to what officers the duplicate order forms and returns filed in the office of the collector of the district shall be open for inspection.

It also specifies the fee to be paid for the information furnished by the collectors upon written request of such officers.

Statute

§ 2556. Inspection and copies of returns, duplicate order forms, and prescriptions

(a) Requirements. The duplicate order forms and the prescriptions required to be preserved under the provisions of section 2554 (c) (2) and (c), and the statements or returns filed in the office of the collector of the district, under the provisions of section 2555 (c), shall be open to inspection by officers, agents, and employees of the Treasury Department duly authorized for that purpose; and such officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the sale, prescribing, dispensing, dealing in, or distribution of the aforesaid drugs. Each collector is authorized to furnish, upon written request, certified copies of any of the said statements or returns filed in his office to any of such officials of any State or Territory or organized municipality therein, or the District of Columbia, or any insular possession of the United States, as shall be entitled to inspect the said statements or returns filed in the office of the said collector, upon the payment of a fee of \$1 for each one hundred words or fraction thereof in the copy or copies so requested. 26 U.S.C.A. § 2556.

(b) Cross reference

For authority of the Secretary to delegate such powers and duties, see subchapter D.

Review of section 2556:

- (a) 1. What records shall be open to inspection?
2. Who may inspect the records?
3. Who may furnish certified copies?
4. What is meant by a certified copy?

Scope of section 2557

Section 2557 provides specific penalties for persons who violate the Act or who fail to comply with its provi-

sions. Specifically, violators may be fined not to exceed \$2000.00 or be imprisoned not more than five years, or both.

Subsections 5, 6, and 7 constitute a new act passed August 12, 1937, 21 U.S.C.A. §§ 200, 200a, 200b, and provide for additional punishment for second, third, and subsequent offenders.

Statute

§ 2557. Penalties

(a) **Unlawful disclosure of information on returns or order forms.** Any person who shall disclose the information contained in the statements or returns required under subsection (c) of section 2555 or in the duplicate order forms required in subsection (e) of section 2554, except as expressly provided in section 2556, and except for the purpose of enforcing the provisions of this subchapter or part V of subchapter A of chapter 27, or for the purpose of enforcing any law of any State or Territory or the District of Columbia, or any insular possession of the United States, or ordinance of any organized municipality therein, regulating the sale, prescribing, dispensing, dealing in, or distribution of the drugs mentioned in section 2550 (a), shall, on conviction, be fined or imprisoned as provided by subsection (b) (1).

(b) Violations in general

(1) Any person who violates or fails to comply with any of the requirements of this subchapter or part V of subchapter A of chapter 27, shall, on conviction, be fined not more than \$2,000 or be imprisoned not more than five years, or both, in the discretion of the court.

(2) Any person required under this subchapter or section 3220 to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this subchapter or section 3220, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than \$10,000, or impris-

oned for not more than one year, or both, together with the costs of prosecution.

(3) Any person required under this subchapter or section 3220 of chapter 27 to collect, account for and pay over any tax imposed by this subchapter or said section 3220, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this subchapter or section 3220 or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(4) Any person who willfully fails to pay, collect, or truthfully account for and pay over, any tax imposed by this subchapter or section 3220 or willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty of the amount of the tax evaded, or not paid, collected or accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected. No penalty shall be assessed under this paragraph for any offense for which a penalty may be assessed under authority of section 3612.

(5) A person who, after having been convicted of selling, importing, or exporting, or conspiring to sell, import, or export, opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine, again sells, imports, or exports, or conspires to sell, import, or export, any of the said narcotic drugs, in violation of the laws of the United States, shall, upon conviction of such second offense, be fined not more than \$5,000 or imprisoned in a Federal penitentiary for not more than ten years, or both, in the discretion of the court, whenever the fact of such previous conviction is established in the manner prescribed in paragraph 7 of this subsection.

(6) A person who, after having been two times convicted of selling, importing, or exporting, or conspiring to sell, import, or export, opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine, again sells, imports, or exports or conspires to sell, import, or export, any of the said narcotic drugs, in viola-

tion of the laws of the United States, shall, upon conviction of such third offense, or any offense subsequent thereto, be fined not more than \$10,000 or imprisoned in a Federal penitentiary for not more than twenty years, or both, in the discretion of the court, whenever the fact of such previous convictions is established in the manner prescribed in paragraph 7 of this subsection.

(7) Whenever it shall appear, after conviction and before or after sentence, that a person convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of the narcotic drugs enumerated in paragraph (5) has previously been convicted of unlawfully selling, importing, or exporting, or conspiring unlawfully to sell, import, or export, any of said narcotic drugs, in violation of the laws of the United States, it shall be the duty of the United States district attorney for the district in which such subsequent conviction was had to file an information alleging that the defendant has previously been so convicted, and further alleging the number of such previous convictions. The court in which the defendant was convicted shall cause the said defendant, whether confined in prison or otherwise, to appear before it and shall apprise him of the allegations of the information and of his right to a trial by jury as to the truth thereof. The court shall inquire of the defendant whether he is the person who has previously been convicted. If the defendant states he is not such person, or if he refuses to answer or remains silent, a plea of not guilty shall be entered by the court, and a jury shall be empaneled to determine whether the defendant is the person alleged in the information to have previously been convicted, and the number of such previous convictions. If after a trial on the sole issue of the truth of such allegations the jury determines that the defendant is in fact the person previously convicted as charged in the information, or if he acknowledges in open court, after being duly cautioned as to his rights, that he is such person, he shall be punished as prescribed in paragraphs 5 or 6 of this subsection, as the case may be, and the previous sentence of the court, if any, shall be vacated and there shall be deducted from the new sentence the amount of time actually served under the sentence so vacated.

(8) The term "person" as used in paragraphs (2) (3) and (4) includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs. 26 U.S.C.A. § 2557.

(c) Cross references

For definition of "person" as used generally in this subchapter, see subsection (a) of section 3228, I.R.C.

For general penalty provisions, see part III of subchapter A of chapter 28 and section 3793 of chapter 38, I.R.C.

Review of section 2557:

- (a) 1. What unlawful disclosures are prohibited?
2. What penalties are imposed?
- (b) 1. Make a summary of offenses and penalties in (1), (2), (3), and (4).
2. In (5), state the penalties imposed on a second offender.
3. In (6), state the penalties for a third violation.
4. In (7), state the court procedure in relation to subsequent violations by the same person.
5. What is the meaning of the word "person" as used here?

Readings on section 2557:

1. Physician convicted of violating the Harrison Narcotic Act by furnishing morphine to an habitual user who was not under his treatment, was guilty of a crime involving "moral turpitude." *Speer v. State*, Tex.Civ.App.1937, 109 S.W.2d 1150.

Scope of section 2558

This section sets forth the procedure necessary for confiscation and disposal of forfeited narcotics.

It gives to department, bureau or agency of the United States, making proper application, such confiscated narcotics for medical or scientific purposes.

*Statute***§ 2558. Forfeitures**

(a) **Unstamped packages.** All unstamped packages of the drugs mentioned in section 2550 (a) found in the possession of any person, except as provided in this subchapter, shall be subject to seizure and forfeiture, and all the provisions of internal revenue laws relating to searches, seizures, and forfeiture of unstamped articles shall be extended to and made to apply to the articles taxed under this subchapter and the persons upon whom the taxes under this subchapter or part V of subchapter A of chapter 27 are imposed.

(b) Seized opium—Confiscation and disposal

(1) **Procedure.** All opium, its salts, derivatives, and compounds, and coca leaves, salts, derivatives, and compounds thereof, seized by the United States Government from any person or persons charged with any violation of this chapter or part V of subchapter A of chapter 27, or the Act of February 9, 1909, c. 100, 35 Stat. 614 as amended by the act of Jan. 17, 1914, c. 9, 38 Stat. 275, U.S.C., Title 21, §§ 171–184, shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States; and the Secretary is authorized to deliver for medical or scientific purposes to any department, bureau, or other agency of the United States Government, upon proper application therefor under such regulation as may be prescribed by the Secretary, any of the drugs so seized, confiscated, and forfeited to the United States. The provisions of this paragraph shall also apply to any of the aforesaid drugs seized or coming into the possession of the United States in the enforcement of this chapter, part V of subchapter A of chapter 27, or any of the above mentioned acts where the owner or owners thereof are unknown. None of the aforesaid drugs coming into possession of the United States under the operation of said chapter, part, or acts, or the provisions of this paragraph, shall be destroyed without certification by a committee appointed by the Secretary that they are of no value for medical or scientific purposes. 26 U.S.C.A. § 2558.

(2) Cross reference

For authority of the Secretary to delegate such powers and duties, see subchapter D.

(c) Cross reference

For general forfeiture provisions, see part III of subchapter A of chapter 28 and section 3793 of chapter 38, I.R.C.

Review of section 2558:

- (a) 1. State the law in relation to unstamped packages.
- 2. What internal revenue laws are applicable?
- (b) 1. What disposition is made of such seized drugs?

*Statute***§ 2559. Regulations**

(a) Making and publishing. The Secretary shall make, prescribe, and publish all needful rules and regulations for carrying the provisions of this subchapter and part V of subchapter A of chapter 27 into effect. 26 U.S.C.A. § 2559.

(b) Cross reference

For authority of the Secretary to delegate such powers and duties, see subchapter D.

*Statute***§ 2560. Personnel**

(a) Appointment. The Secretary is authorized to appoint such agents, deputy collectors, inspectors, chemists, assistant chemists, clerks, and messengers in the field and in the Bureau of Internal Revenue in the District of Columbia as may be necessary to enforce the provisions of this subchapter and part V of subchapter A of chapter 27. 26 U.S.C.A. § 2560.

(b) Cross reference

For authority of the Secretary to delegate such powers and duties, see subchapter D.

*Statute***§ 2561. Laws unaffected**

Nothing contained in this subchapter or part V of subchapter A of chapter 27 shall be construed to impair, al-

ter, amend, or repeal any of the provisions of the Act of Congress approved June thirtieth, nineteen hundred and six, entitled "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded, or poisonous, or deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes," c. 3915, 34 Stat. 768, U.S.C., Title 21, §§ 1-15, and any amendment thereof, or of the Act approved February ninth, nineteen hundred and nine, entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes," c. 100, 35 Stat. 614, U.S.C., Title 21; §§ 171-185, and any amendment thereof. 26 U.S.C.A. § 2561.

Statute

§ 2562. Other laws applicable

(a) **General.** All administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, shall be extended to and made a part of this subchapter and sections 3220, 3221, 3222, and subsection (a) of section 3224 of chapter 27. 26 U.S.C.A. § 2562.

(b) Cross reference

For provisions making applicable the internal revenue laws relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps, see subsection (b) of section 2552.

Statute

§ 2563. Territorial extent of law

The provisions of this subchapter and part V of subchapter A of chapter 27 shall apply to the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, the insular possessions of the United States, and the Canal Zone. 26 U.S.C.A. § 2563.

Statute

§ 2564. Administration in insular possessions and Canal Zone

(a) **Puerto Rico and the Philippine Islands.** In Puerto Rico and the Philippine Islands the administration of this

subchapter and part V of subchapter A of chapter 27, the collection of the special tax imposed by section 3220 of chapter 27, and the issuance of the order forms specified in section 2554 shall be performed by the appropriate internal revenue officers of those governments, and all revenues collected thereunder in Puerto Rico and the Philippine Islands shall accrue intact to the general governments thereof, respectively. The courts of first instance in the Philippine Islands shall possess and exercise jurisdiction in all cases arising in said islands under this subchapter and said part V of chapter 27.

(b) **Canal Zone.** The President is authorized and directed to issue such Executive orders as will carry into effect in the Canal Zone the intent and purpose of this subchapter and part V of subchapter A of chapter 27 by providing for the registration and the imposition of a special tax upon all persons in the Canal Zone who produce, import, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations. 26 U.S.C.A. § 2564.

(c) **Virgin Islands**

For authority of the President to exempt persons in the Virgin Islands from the order form requirements, see subsection (b) of section 2554.

Statute

§ 2565. Definitions

For definitions of the following, see the subsections of section 3228 indicated below:

Person

Subsection (a).

Importer, manufacturer, or producer

Subsection (b).

Wholesale dealer

Subsection (c).

Retail dealer

Subsection (d).

26 U.S.C.A. § 2565.

Scope of section 3220

The purpose of this section is to classify all persons who have anything to do with the importing, handling or dealing in any way with opium or coca leaves, or any of their compounds or derivatives. It also makes provision for the tax payable by each class.

Article 13 of Regulation No. 5, Bureau of Narcotics, presents the classification to which reference is made throughout the Act. For convenience it is included here.

"Rates of tax.—Persons subject to tax are divided into classes as shown by the table below:

Class	Annual tax rate	Persons liable
I	\$24	Importers, manufacturers, producers, compounders.
II	12	Wholesale dealers.
III	3	Retail dealers.
IV	1	Physicians, dentists, veterinary surgeons, and other practitioners.
¹ V	1	Manufacturers of and dealers in exempt preparations (including dispensing physicians).
VI	1	Persons not registered in Class I, but lawfully entitled to obtain and use in a laboratory narcotics for the purpose of research, instruction or analysis.

¹ Persons paying tax in any of the Classes I to IV, inclusive, are not required to pay tax in Class V on account of manufacture or sale of exempt preparations.

"When business is done during the month of July, tax shall be paid for the full year. The tax in Classes IV or V is at the rate of \$1 a year or any fraction thereof, regardless of when business is first commenced. In Classes I to III, inclusive, and in Class VI, if business is commenced after the month of July, the amount due is to be reckoned proportionately by months from the first day of the month in which business is begun to July 1 following."

Statute

§ 3220. Tax

On or before July 1 of each year every person who imports, manufactures, produces, compounds, sells, deals in,

dispenses, or gives away opium or coca leaves, or any compound, manufacture, salt, derivative, or preparation thereof, shall pay the special taxes hereinafter provided. Every person upon first engaging in any of such activities shall immediately pay the proportionate part of the tax for the period ending on the following June 30.

(a) Importers, manufacturers, or producers. Importers, manufacturers, producers, or compounders, lawfully entitled to import, manufacture, produce, or compound any of the aforesaid drugs, \$24 per annum;

(b) Wholesale dealers. Wholesale dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, \$12 per annum;

(c) Retail dealers. Retail dealers, lawfully entitled to sell and deal in any of the aforesaid drugs, \$3 per annum;

(d) Physicians, dentists, veterinary surgeons, and other practitioners. Physicians, dentists, veterinary surgeons, and other practitioners, lawfully entitled to distribute, dispense, give away, or administer any of the aforesaid drugs to patients upon whom they in the course of their professional practice are in attendance, \$1 per annum or fraction thereof during which they engage in any of such activities;

(e) Persons engaged in research, instruction, or analysis. Persons not registered as an importer, manufacturer, producer, or compounder and lawfully entitled to obtain and use in a laboratory any of the aforesaid drugs for the purpose of research, instruction, or analysis shall pay \$1 per annum, but such persons shall keep such special records relating to receipt, disposal, and stocks on hand of the aforesaid drugs as the Commissioner of Narcotics, with the approval of the Secretary, may by regulation require. Such special records shall be open at all times to the inspection of any duly authorized officer, employee, or agent of the Treasury Department. 26 U.S.C.A. § 3220.

(f) Persons not otherwise taxed

For a tax of \$1 a year on persons not otherwise taxed, dispensing preparations and remedies of limited narcotic content, see section 2551 (a).

(g) Persons in Canal Zone

For authority of the President to issue Executive orders providing for the imposition of a special tax upon all persons in the Canal Zone

who produce, import, compound, deal in, dispense, distribute, sell, or give away opium or coca leaves, their salts, derivatives, or preparations, see section 2564 (b).

Review of section 3220:

1. Who shall pay the special tax?
2. When shall it be paid?
3. When is it necessary to pay a proportionate part of the tax?
4. Why is this an occupational tax?
 - (a) 1. Who shall pay \$24.00 per annum?
 - (b) 1. What tax shall the wholesale dealers pay?
 - (c) 1. What amount shall the retail dealers pay?
 - (d) 1. What professional classes are included in section (d)?
 2. What tax is imposed upon them?
 3. What four acts are stated in this section?
 - (e) 1. Why are laboratory workers included?
 2. What special duty is imposed on them?

Readings on section 3220:

1. For a history of this section, see 26 U.S.C.A. § 3220. All cases construing this section may be found there also.
2. Congress has no power under the Federal Constitution to regulate the price of medicine. *Du Vall v. Board of Medical Examiners of Arizona*, 1937, 49 Ariz. 329, 66 P.2d 1026.
3. No one registered in a particular category can lawfully invade the field of a person in another category. *Flowers v. U. S.*, C.C.A.Neb.1936, 83 F.2d 78.
4. "Other practitioners" in this section does not mean illicit, curbstome peddlers. *Flowers v. U. S.*, C.C.A.Neb.1936, 83 F.2d 78.
5. Violator arrested by officer without warrant. *Stoble v. U. S.*, C.C.A.Ill.1937, 91 F.2d 69.
6. In prosecution for sale of morphine in violation of Harrison Anti-Narcotic Act, jury may consider that defendant was a two-time ex-convict. *Flowers v. U. S.*, C.C.A.Neb.1936, 83 F.2d 78.

*Statute***§ 3221. Registration**

(a) **Requirements.** On or before July 1 of each year every person who engages in any of the activities enumerated in section 3220 shall register with the collector of the district his name or style, place of business and place or places where such business is to be carried on, and every person upon first engaging in any such activities shall immediately make like registration. 26 U.S.C.A. § 3221.

(b) Transfer of duties

For authority of the Secretary to delegate such powers and duties, see subchapter D.

Review of section 3221:

1. Who shall register?
2. Where shall he register?
3. What facts must be stated in his application for registration?

Readings on section 3221:

1. One dealing in the drug must register at the place where business is to be carried on. *Wallace v. U.S.*, Ill.1917, 243 F. 300, 156 C.C.A. 80.
2. This is a criminal statute, and must be strictly construed. *U. S. v. Wilson*, D.C.Tenn.1915, 225 F. 82.
3. Separate registrations required where physician both dispenses and as a dealer dispenses narcotic drugs. *Blunt v. U. S.*, C.C.A.Ill.1918, 249 U.S. 608, 39 S.Ct. 290, 63 L.Ed. 800.
4. Right to register and obtain a permit. *Starnes v. Rose*, D.C.Ga.1922, 282 F. 336.

*Statute***§ 3222. Exemption from tax and registration**

(a) **Employees.** No employee of any person who has registered and paid special tax as required in this part acting within the scope of his employment, shall be required to register and pay special tax provided by sections 3220 and 3221.

(b) **Government and State officials.** Officials of the United States, Territorial, District of Columbia, or insular possessions, State or municipal governments, who in the exercise of their official duties engage in any of the business herein described, shall not be required to register, nor pay special tax, but their right to this exemption shall be evidenced in such manner as the Secretary may by regulations prescribe. 26 U.S.C.A. § 3222.

(c) **Cross references**

(1) **Canal Zone**

For authority of the President to issue Executive orders providing for the registration of all persons in the Canal Zone who produce, import, compound, deal in, dispense, distribute, sell, or give away opium or coca leaves, their salts, derivatives, or preparations, see section 2504.

(2) **Transfer of duties**

For authority of the Secretary to delegate such powers and duties, see subchapter D.

Review of section 3222:

- (a) 1. Why are employees not required to register?
- (b) 1. What officials are exempt from registration?
- 2. Why are they exempt?
- 3. How is their exemption evidenced?

Statute

§ 3223. Possession of stamped packages as evidence of tax liability. 26 U.S.C.A. § 3223.

For possession of original stamped packages as prima facie evidence of liability to special tax, see section 2553 (a).

Scope of section 3224

This section makes provision for punishment of those persons who are required to register under the Act but who have failed to do so. There are specifically mentioned the acts of trafficking, transportation and possession.

It was necessary to make some exemptions to the drastic provisions relating to the crimes of transportation and possession. As to transportation, the exemptions were extended to carriers, and employees of properly registered persons. In relation to possession, exemptions were ex-

tended to employees, to nurses under certain restrictions, to persons who secured the drug under a lawful prescription, to warehousemen, and to certain specified officers.

Statute

§ 3224. Unlawful acts in case of failure to register and pay special tax

(a) **Trafficking.** It shall be unlawful for any person required to register under the provisions of this part or section 2551(a) to import, manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away any of the aforesaid drugs without having registered and paid the special tax as imposed by this part, or section 2551(a).

(b) **Transportation.** It shall be unlawful for any person who shall not have registered and paid the special tax as required by sections 3220 and 3221 to send, ship, carry, or deliver any of the aforesaid drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, to any person in any other State or Territory or the District of Columbia or any insular possession of the United States: *Provided*, That nothing contained in this subsection shall apply to common carriers engaged in transporting the aforesaid drugs, or to any employee acting within the scope of his employment, of any person who shall have registered and paid the special tax as required by sections 3220 and 3221, or to any person who shall deliver any such drug which has been prescribed or dispensed by a physician, dentist, or veterinarian required to register under the terms of this part or section 2551 (a), who has been employed to prescribe for the particular patient receiving such drug, or to any United States, State, county, municipal, district, Territorial, or insular officer or official acting within the scope of his official duties.

(c) **Possession.** It shall be unlawful for any person who has not registered and paid the special tax as provided for by this part or section 2551(a), to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this subsection and subsection (a),

and also a violation of the provisions of sections 3220 and 3221: *Provided*, That this subsection shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this part or section 2551(a), having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this part or section 2551(a); or to any United States, State, county, municipal, District, Territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this part and subchapter A of chapter 23; or to common carriers engaged in transporting such drugs: *Provided further*, That it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this part or subchapter A of chapter 23; and the burden of proof of any such exemption shall be upon the defendant. 26 U.S. C.A. § 3224.

Review of section 3224:

- (a)
 - 1. What acts are made unlawful?
 - 2. To whom does this section apply?
 - 3. Why would a person fail or neglect to register?
- (b)
 - 1. What acts of transportation are made unlawful?
 - 2. Why are these acts of transportation made unlawful?
 - 3. Why does this act not apply to common carriers, or to certain employees?
 - 4. What is the exemption in relation to delivering prescriptions?
- (c)
 - 1. What act of possession is made unlawful?
 - 2. What acts are made presumptive evidence of a violation of this section?
 - 3. What special provision is made in relation to employees and nurses?
 - 4. Why is immunity provided for officials, officers, warehousemen, and common carriers?

5. Who has the burden of proof of such exemptions?

Readings on section 3224:

1. Charges of possessing morphine under this section are not applicable to persons who are not dealers. *Roberts v. U. S.*, C.C.A.Mo.1938, 96 F.2d 39.
2. Accused to be convicted under this section must have been dealer required to register. *Acuna v. U. S.*, C.C.A.Tex.1934, 74 F.2d 359.
3. In prosecution under Harrison-Anti-Narcotic Act, defendant must prove that he has registered and paid special tax. *Flowers v. U. S.*, C.C.A.Neb. 1936, 83 F.2d 78.
4. In prosecution for illegal sale and possession of narcotics, defendant's guilt held a question for the jury. *U. S. v. Frank*, C.C.A.Pa.1936, 82 F.2d 315.

Statute

§ 3225. Penalties. 26 U.S.C.A. § 3225.

For penalties for violating or failing to comply with any of the provisions of this part, see section 2557 (b) (1).

§ 3226. List of special taxpayers

(a) **Supply.** Collectors are authorized to furnish upon written request, to any person, a certified copy of the names of any or all persons who may be listed in their respective collection districts as special taxpayers under the provisions of this part or section 2551 (a), upon payment of a fee of \$1 for each 100 names or fraction thereof in the copy so requested. 26 U.S.C.A. § 3226.

(b) **Transfer of duties**

For authority of the Secretary to delegate such powers and duties, see subchapter D.

§ 3227. Other laws applicable

(a) All provisions of law relating to special taxes, as far as necessary shall be extended and made applicable to the special tax imposed by this part.

(b) All laws relating to the assessment, collection, remission, and refund of internal revenue taxes, including

section 3761, so far as applicable to and not inconsistent with the provisions of this part and subchapter A of chapter 23, shall be extended and made applicable to the special taxes imposed by this part and section 2551(a). 26 U.S.C.A. § 3227.

Statute

§ 3228. Definitions

(a) **Person.** The word "person" as used in this part and subchapter A of chapter 23 shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person.

(b) **Importer, manufacturer, or producer.** Every person who imports, manufactures, compounds, or otherwise produces for sale or distribution any of the drugs mentioned in section 3220 shall be deemed to be an importer, manufacturer, or producer.

(c) **Wholesale dealer.** Every person who sells, or offers for sale, any of said drugs in the original stamped packages as provided in section 2553(a) shall be deemed a wholesale dealer.

(d) **Retail dealer.** Every person who sells or dispenses from original stamped packages as provided in section 2553(a) shall be deemed a retail dealer: *Provided*, That the office, or if none, the residence, of any person shall be considered for the purposes of this part and subchapter A of chapter 23 his place of business. 26 U.S.C.A. § 3228.

SUBCHAPTER B—OPIUM FOR SMOKING

Scope of section 2567

A tax on all opium for smoking purposes manufactured in the United States is provided for in this section.

Statute

§ 2567. Tax

(a) **Rate.** An internal revenue tax of \$300 per pound shall be levied and collected upon all opium manufactured in the United States for smoking purposes.

(b) How paid

(1) **Stamps.** All opium prepared for smoking manufactured in the United States shall be duly stamped in such a permanent manner as to denote the payment of the internal revenue tax thereon. 26 U.S.C.A. § 2567.

(2) Assessment

For assessment in case of omitted taxes payable by stamp, see section 3311 of chapter 28 and section 3640 of chapter 35, of I.R.C.

Review of section 2567:

- (a) 1. State the tax on opium for smoking.
- 2. Who is subject to the tax?
- (b) 1. How shall the opium be stamped?

Readings on section 2567:

- 1. This section is constitutional though tax is so high as to be prohibitive of the traffic. *Lee Mow Lin v. U. S.*, C.C.A.Mo.1918, 250 F. 694.
- 2. Conviction under this section. *McNichol v. U. S.*, C.C.A.Tenn.1925, 9 F.2d 623.
- 3. Failure to stamp. *Chin Sing v. U. S.*, Ill.1915, 227 F. 397, 142 C.C.A. 93.

*Statute***§ 2568. Stamps**

The provisions of law covering the engraving, issue, sale, accountability, effacement, cancellation, and the destruction of stamps relating to tobacco and snuff, as far as applicable, shall apply to stamps provided for by paragraph (1) of subsection (b) of the preceding section. 26 U.S.C.A. § 2568.

Scope of section 2569

What constitutes a manufacturer of smoking opium is stated in Section 2569. It also specifies what the requirements are to permit a person to become such a manufacturer, as well as giving certain rules for conducting his business.

*Statute***§ 2569. Manufacturers**

(a) **Definition.** Every person who prepares opium suitable for smoking purposes from crude gum opium, or from any preparation thereof, or from the residue of smoked or partially smoked opium, commonly known as yen shee, or from any mixture of the above, or any of them, shall be regarded as a manufacturer of smoking opium within the meaning of this subchapter.

(b) **Bond.** Every manufacturer of opium suitable for smoking purposes shall file with the collector of the district in which his manufactory is located such bonds as the Secretary may by regulation require. But the bond required of such manufacturer shall be with sureties satisfactory to the collector, and in a penal sum of not less than \$100,000; and the sum of said bond may be increased from time to time and additional sureties required, at the discretion of the collector or under instructions of the Secretary. No person shall engage in such manufacture who has not given the bond required by the Secretary.

(c) **Citizenship.** No person shall engage in the manufacture of opium suitable for smoking purposes who is not a citizen of the United States.

(d) **Other requirements.** Every manufacturer of opium suitable for smoking purposes shall—

(1) **Notices and inventories.** File with the collector of the district in which his manufactory is located such notices and inventories,

(2) **Books and returns.** Keep such books and render such returns of material and products,

(3) **Signs and factory number.** Put up such signs and affix such number to his factory, and

(4) **Conduct of business.** Conduct his business under such surveillance of officers and agents as the Secretary may by regulation require. 26 U.S.C.A. § 2569.

(5) **Cross reference**

For authority of the Secretary to delegate such powers and duties, see subchapter D.

Review of section 2569:

- (a) 1. Who shall be regarded as a manufacturer of smoking opium?
- (b) 1. What bond must be filed by a manufacturer?
- (c) 1. Why must a person be a citizen of the United States before engaging in the manufacture of opium?
- (d) 1. State the duties imposed on a manufacturer of opium for smoking.

Readings on section 2569:

- 1. Purpose is to tax and regulate the manufacture of smoking opium. *Marks v. U. S.*, N.Y.1912, 196 F. 476, 116 C.C.A. 250.
- 2. Adding water to an extract of opium itself smokable held not to constitute a manufacturer of smoking opium. *Seidler v. U. S.*, C.C.A.N.Y.1915, 228 F. 336.
- 3. The fact that one accused of manufacturing smoking opium smoked it himself is relevant. *Tam Shi Yan v. U. S.*, N.Y.1915, 224 F. 422, 140 C.C.A. 116.
- 4. There can be only one penalty for a violation of this section. *Charley Toy v. U. S.*, C.C.A.N.Y. 1920, 266 F. 326.
- 5. Expert testimony admissible on question whether smoking opium was of domestic or foreign manufacture. *Lee Mow Lin v. U. S.*, C.C.A.Mo.1918, 250 F. 694.

*Statute***§ 2570. Penalty**

A penalty of not less than \$10,000 or imprisonment for not less than five years, or both, in the discretion of the court, shall be imposed for each and every violation of this subchapter relating to opium by any person or persons. 26 U.S.C.A. § 2570.

§ 2571. Forfeiture

All opium prepared for smoking wherever found within the United States without the stamps required by this subchapter shall be forfeited and destroyed. 26 U.S.C.A. § 2571.

CHAPTER 2

FEDERAL FOOD, DRUG, AND COSMETIC ACT

(For omitted sections see Appendix 3, page 460)

Division 1.—The Federal Food, Drug, and Cosmetic Act.
Division 2.—The Wheeler-Lea Act.

DIVISION 1

FEDERAL FOOD, DRUG, AND COSMETIC ACT

The Constitution of the United States does not give to Congress power directly to legislate respecting food and drugs. The validity of the Food and Drugs Act rests, then, on the power of Congress to legislate for the District of Columbia and the territories of the United States and in its power to regulate interstate commerce. Congress has power not only to regulate interstate commerce, but also power to keep the channels of such commerce free from the transportation of harmful or illicit articles.

Food and Drug Conditions Change in 33 Years

The first Food and Drugs Act went into effect June 30, 1906, and continued in force with a few amendments until June 25, 1939. Despite its many defects, this act was a great improvement over conditions existing at the time it became operative. At that period adulteration and misbranding of drugs were considered the outstanding evils in this line. The act went far toward remedying these abuses. Since the enactment of the earlier law there have been made changes in our economic structure and mode of life. Many industries, then unknown and unanticipated, have sprung up. The growth of commercial canneries and of the manufacture and use of cosmetics and therapeutic devices has been great. In addition, many proprietary foods and drugs have been put on the market. The law of 1906 was not sufficient to meet the new conditions and resulting problems.

Federal Food and Drug Act Outgrown

As time went on the inadequacies of the old law became apparent. As these deficiencies came to light new legislation was demanded. Abuses arose from the fact there were no provisions for (1) control of advertising other than that appearing on the label; (2) for mechanical devices sold for alleviation and cure of disease; (3) for the labeling of cosmetics, hair dyes, etc.; (4) that the narrowness of the definition of "drugs" excluded control of misbranded or adulterated cosmetics; (5) and unsatisfactory enforcement procedure.

The 1906 Act prohibited the shipment in interstate commerce of adulterated or misbranded food or drugs, but did not include cosmetics nor advertising not on the label. This left the manufacturer free to use any kind of advertising he desired so long as it did not appear on the label, and cosmetics were unregulated by the Act. As a result many abuses arose.

State Statutes Must Not Conflict with Federal Laws

The food and drug laws of the states must not be in conflict with the federal laws on the same subject. From a review of the cases, it is found that the state food laws have caused some trouble in this regard, but the drug laws have not. The federal act is based upon the power of Congress to regulate interstate commerce, so, when interstate commerce in the article has ceased, it then becomes subject to the laws of the state into which it is brought. The states have power to regulate commerce in foods and drugs within their own territory. In the exercise of this authority, state statutes have been passed requiring the disclosure of ingredients of patent medicines, regulating the sale of foodstuffs in the original packages, and regulating the transportation of such articles solely within the territory of the state.

New Act Has a Background

The new law starts off with a much different background from that of 1906. During these thirty-three years much progress has been made, many excellent studies have been undertaken and articles written, and many hard fought law suits have been culminated. All this provides a large body of

valuable material to which constant resort may be made. The new act owes many of its best features to this broad background provided by the old act.

Complete Revision Deemed Necessary

The Copeland Bill (S.5) which was approved June 25, 1938, to be operative for the most part one year later, is a complete revision of the Act of June 30, 1906. A few comparatively unimportant amendments had been made to the old Act, but these seemed insufficient, and after much discussion and controversy a complete revision was made.

This revision consists of two bills, the Copeland Bill (S. 5), approved June 25, 1938, 21 U.S.C.A. § 301 et seq., and the Wheeler-Lea Bill (S. 1077), approved March 21, 1938, operative May 21, 1938, 15 U.S.C.A. § 52 et seq. The separation of this law into two Bills was a great disappointment to Dr. Copeland, the constant advocate of the revised law. The Wheeler-Lea Bill has reference to all advertising other than that on labels, and places this in control of the Federal Trade Commission.

As viewed today these two laws should give to the Federal Government complete control over abuses arising in relation to food and drugs introduced into interstate commerce. There no doubt will arise situations in which a manufacturer violates provisions as to advertising, both on the label and otherwise, in which case both the Food and Drug Administration, and the Federal Trade Commission will be concerned. It may be found that this dual authority will prove cumbersome, due to the fact that two departments of government will be involved in the enforcement.

Triangle of Interests

From the criticisms of the old Act it is apparent that there is a triangle of interests, consisting of the manufacturer, the consumer, and the government. In addition to the Federal laws on the subject, there are also state laws and state enforcement. In the past there has been much feeling that food and drug regulation should be left to the states, but many situations arose which could not be properly handled by the state alone, and the Federal government had to enter with a strong hand. However, each state has its own food and drug

regulations, which cover situations which the Federal government cannot control under authority to regulate interstate commerce. At the present time there is a movement to secure the passage of an uniform state food and drug act which can be enforced satisfactorily in conjunction with the new Federal Act.

Title of the New Act

As shown by the government bulletin, the Copeland Bill is Public Act, No. 717, 75 Congress, Chapter 675, Third Session, S. 5, and is entitled "An Act to prohibit the movement in interstate commerce of adulterated and misbranded food, drugs, devices and cosmetics, and for other purposes."

In Chapter I is this statement concerning the title, which shortens and simplifies it. "This Act may be cited as the Federal Food, Drug, and Cosmetic Act."

In the short title the word "devices" is omitted. In the full title it will be noted that the closing phrase is "and for other purposes." Just what this may include is not indicated by the Act.

CHAPTER II—DEFINITIONS

The old Act defined only five terms—namely, *territory*, *person*, *butter*, *drug*, and *food*. Some of the most severe criticisms of this Act were aimed at this paucity of definition. The restricted meaning given to the word *drug* was especially criticised.

In the Copeland Bill there seem to be an adequate number of definitions. These are apparently sufficiently accurate and inclusive.

The definitions of *food*, *drug*, *device*, and *cosmetic* are the same in both the Copeland Bill and the Wheeler-Lea Bill, both of which are given in full in the appendix of this book.

In the first twelve subdivisions are defined (a) territory, (b) interstate commerce, (c) department, (d) Secretary, (e) person, (f) food, (g) drug, (h) device, (i) cosmetic, (j) official compendium, (k) label, (l) immediate container, and (m) labeling. Divisions (n) and (o) do not define specific terms. The first is an explanation of misbranding because the label is misleading. The second states that an article labeled as an antiseptic shall be considered a representation that it is a germicide.

The last section is the much discussed definition of *new drug*.

Food Defined

As previously stated, the drafters of this Act had the benefit of thirty-three years experience under the old Act to guide them. As a result, the new definitions are much more comprehensive and clarify many points. The word "food" is so defined as to include (1) food or drink for man or other animals, (2) chewing-gum, and (3) materials used as components of such articles.

Drug Defined

Since so much criticism had been directed against the definition of "drug" as contained in the 1906 Act, it is not surprising that much time and effort were expended to make a model definition. In the new Act the definition is divided into four parts:

1. Articles recognized in the official U. S. Pharmacopoeia, official Homoeopathic Pharmacopoeia of the U. S., or official National Formulary, or any supplement of them;
2. Articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals;
3. Articles (other than food) intended to affect the structure or any function of the body of man or other animals; and
4. Articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

Devices Defined

It is a quite common practice for statutes to give special meaning to certain terms used, thus eliminating so far as the statute is concerned any other meaning the words might otherwise have. The new Food and Drug Act uses this method, so it is of no avail to attempt to interpret it by means of any other definitions.

It was found that the old Act did not cover the so-called obesity cures, nor mechanical devices used to accomplish weight reduction. Neither did it include mechanical devices

used in the treatment or diagnosis of disease. Therefore it seemed advisable to give a specific definition of "device."

It is unfortunate that in this Act there are parts to which the definition here formulated does not apply. The five exceptions made by the authors of the Bill are sections 201(n), 301(i), 403(f), 502(c), and 602(c). With these exceptions, the term means "instruments, apparatus and contrivances, including their components, parts, and accessories, intended (1) for the use in diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals." This is plainly a definition made to meet a specific situation.

Cosmetic Defined

After so much criticism of offenses and abuses under the use and advertising of cosmetics it is surprising how short and concise a definition is made to cover the subject. The term "cosmetics" is made to include "articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body, or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles except that such term shall not include soap." It will be interesting to note whether this definition is sufficient to cover the many situations that now exist or may arise in the future.

Definitions of Label and Labeling

The definitions of "label" and "labeling" may be somewhat confusing as the term "label" means a display of written, printed or graphic matter upon the immediate container of any article, while the term "labeling" is used in a much broader sense than merely the act of placing the label. Here "labeling" means all label or other written, printed, or graphic matter, not only upon any article or any of its containers or wrappers, but also any such matter accompanying such article. Whereas the term "label" is restricted to information on the immediate article or its container, "labeling" includes all such matter accompanying the article. These definitions are carefully drawn and should do away with any misunderstanding concerning the use of the two terms.

As previously stated, statements on the label come under the control of the Food, Drug, and Cosmetic Administration, while all other advertising concerning food, drugs, devices, and cosmetics is under the regulation of the Federal Trade Commission.

Statute

CHAPTER II—DEFINITIONS

Sec. 321. For the purposes of this Act—

(a) The term "Territory" means any Territory or possession of the United States, including the District of Columbia and excluding the Canal Zone.

(b) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

(c) The term "Department" means the Department of Agriculture of the United States.

(d) The term "Secretary" means the Secretary of Agriculture.

(e) The term "person" includes individual, partnership, corporation, and association.

(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(g) The term "drug" means (1) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

(h) The term "device" (except when used in paragraph (n) of this section and in sections 331 (i), 343 (f), 352 (c), and 362 (c)) means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to af-

fect the structure or any function of the body of man or other animals.

(i) The term "cosmetic" means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.

(j) The term "official compendium" means the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, official National Formulary, or any supplement to any of them.

(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this Act that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(l) The term "immediate container" does not include package liners.

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the labeling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

(o) The representation of a drug, in its labeling, as an antiseptic shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be, or represented as, an antiseptic for inhibitory use as a wet

dressing, ointment, dusting powder, or such other use as involves prolonged contact with the body.

(p) The term "new drug" means—

(1) Any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to the enactment of this Act it was subject to the Food and Drugs Act of June 30, 1906, as amended, and if at such time its labeling contained the same representations concerning the conditions of its use; or

(2) Any drug the composition of which is such that such drug, as a result of investigations to determine its safety for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions. 21 U.S.C.A. § 321.

Review of section 321:

- (a) 1. Define "Territory."
2. Why is the District of Columbia included?
3. Why is the Canal Zone excluded?
- (b) 1. Define "Interstate Commerce."
2. Is commerce wholly within the District of Columbia or within an unorganized Territory included?
- (c) 1. Explain the meaning of "Department."
- (d) 1. Define "Secretary."
- (e) 1. What is the scope of the word "person"?
2. Do these divisions represent different legal entities?
- (f) 1. Define "food."
2. Why is chewing gum a food?
3. Why should the component parts of such articles be included?
- (g) 1. Define "drug."
2. Distinguish clearly the purpose of the four separate divisions of this definition.
3. Why are "devices or their components, parts, or accessories" excluded?
4. Why are parts 2 and 3 of this definition important?

- (h)
 - 1. What does the term "device" mean?
 - 2. Why was it necessary to make exceptions to this definition?
 - 3. Explain these 5 exceptions.
 - 4. Name some instruments used "in the diagnosis, mitigation, treatment, or prevention of disease".
 - 5. Why are "animals" included?
 - 6. What devices have been used to affect the structure or function of the body?
- (i)
 - 1. Define "cosmetic."
 - 2. Why is the definition divided into 2 parts?
 - 3. Why is "soap" excluded?
- (j)
 - 1. What is the meaning of "official compendium"?
 - 2. Why is the official "Homœopathic Pharmacopœia" included?
- (k)
 - 1. Explain the use of the term "label".
 - 2. What is meant by "immediate container"?
 - 3. Where in this Act is there a requirement that certain information must appear on the label?
 - 4. Is it necessary for this same information to appear on the outside container or wrapper?
 - 5. What is the situation if the outside container or wrapper is transparent?
- (l)
 - 1. What is excluded from the term "immediate container"?
- (m)
 - 1. Define "labeling."
 - 2. To what extent does the term "labeling" include more than the act of putting on a "label"?
 - 3. Compare the meanings of "label" and "labeling."
- (n)
 - 1. If a label is misleading, why does it constitute misbranding?
 - 2. How do you determine that a label is misleading?
 - 3. When is it misbranding to fail to reveal material facts?
- (o)
 - 1. What are the consequences if a drug is represented as an antiseptic?
 - 2. State the exception to the above requirement.
- (p)
 - 1. Explain the meaning of "new drug."
 - 2. State the exception to this meaning as given in part 1 of the definition.
 - 3. How does part 2 of the definition differ from part 1?

CHAPTER III—PROHIBITED ACTS AND PENALTIES

The twelve sections dealing with prohibited acts are brief and clear but deserve much study and attention. Sections (a), (b), (c), and (d) state the offenses relating to adulterated or misbranded food, drug, device, or cosmetic in relation to interstate commerce. Sections (e) and (f) relate to the right of Federal officers to inspect and make records concerning carriers, warehouses and vehicles. Section (g) concerns itself with the Federal government's right of direct control over certain violations of this Act in the Territories. Section (h) makes it an offense to violate the provisions of the guaranty clause. Sections (i), (k), and (l) deal with crimes in relation to labeling. Finally section (j) attempts to provide for protection of the secrets of the manufacturer which may be learned by officers in enforcing the provisions of this Act.

Statute

CHAPTER III—PROHIBITED ACTS AND PENALTIES

PROHIBITED ACTS

Sec. 331. The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344 or 355.

(e) The refusal to permit access to or copying of any record as required by section 373.

(f) The refusal to permit entry or inspection as authorized by section 374.

(g) The manufacture within any Territory of any food, drug, device, or cosmetic that is adulterated or misbranded.

(h) The giving of a guaranty or undertaking referred to in section 333 (c) (2), which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 333 (c) (3), which guaranty or undertaking is false.

(i) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of section 344, 346 (b), 354, or 364.

(j) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under authority of section 344, 355, or 374 concerning any method or process which as a trade secret is entitled to protection.

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded.

(l) The using, on the labeling of any drug or in any advertising relating to such drug, of any representation or suggestion that an application with respect to such drug is effective under section 355, or that such drug complies with the provisions of such section. 21 U.S.C.A. § 331.

Review of section 331:

- (a) 1. Is a violation of these prohibited acts a crime?
 2. How many of these terms have been defined already?
 3. What is the difference between "introduction" and delivery for introduction into interstate commerce?
- (b) 1. How could one of the commodities be misbranded or adulterated "in interstate commerce"?
- (c) 1. What is meant by "receipt" and "delivery" as used in this section?
 2. Does this section refer to a carrier?

- (d) 1. What are the regulations of sections 344 and 355?
2. What acts are forbidden by subdivision (d)?
- (e) 1. What is required by section 373?
2. What records are here meant?
3. Why is a copy of these records essential?
- (f) 1. What are the provisions of section 374?
2. For what purposes may the officers make entry?
- (g) 1. Does this clause indicate that the Federal Government has complete control within any Territory of the adulterated or misbranded foods, drugs, devices, and cosmetics?
- (h) 1. What are the provisions of 333 (c) (2) and 333 (e) (3)?
2. What protection is secured by this guaranty?
3. What protection is given to a person who relied upon a false guaranty?
4. What is the difference in liability in receiving a false guaranty and in giving one?
- (i) 1. State the provisions of sections 344, 346 (b), 354, 364.
2. State the improper use of identification symbols enumerated in this paragraph.
- (j) 1. What are the provisions of 344, 355, 374?
2. What is the purpose of this paragraph?
3. To whom may such secrets be properly disclosed?
- (k) 1. Does this section refer only to acts done after shipment in interstate commerce?
2. Name the ways of changing the label.
- (l) 1. What are the provisions of 505?
2. Why does this provision include offenses against both labeling and advertising?

Injunction Proceedings

Since the Food, Drug, and Cosmetic Act is a Federal law, it necessarily follows that the district courts of the United States, and the United States Court of the Territories have jurisdiction to try all offenses against it.

Remedy by injunction was not granted under the old Act so its use here to restrain violations of the Act is new.

It is much fairer to the manufacturer in borderline cases to determine the question under an injunction proceeding than to rush immediately into a criminal prosecution. This proceed-

ing gives the public protection for the time being, and at the same time does not impose too great a hardship on the manufacturer. In addition, this type of problem can be handled better under injunction proceedings than in a criminal prosecution.

Trial by Jury

Trial by jury is not granted to the defendant in an injunction proceeding, but if the injunction is violated and contempt proceedings are instituted, the accused may demand a trial by jury.

Statute

INJUNCTION PROCEEDINGS

Sec. 332. (a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., 1934 ed., title 28, sec. 381), to restrain violations of section 331, except paragraphs (e), (f), (h), (i), and (j).

(b) In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this Act, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 22 of such Act of October 15, 1914, as amended (U.S.C., 1934 ed., title 28, sec. 387). 21 U.S.C.A. § 332.

Review of section 332:

- (a) 1. What courts have jurisdiction to restrain violations of section 301?
2. Explain why paragraphs (e), (f), (h), (i) and (j) are excepted.
3. What is meant by restraining violations?
- (b) 1. What is meant by violation of an injunction?
2. What is meant by trial by the court as distinguished from trial by jury?

3. In the original injunction, may the accused demand trial by jury?
4. If the accused has violated the injunction, then may he demand trial by jury?
5. What Federal courts have jurisdiction in these cases?

Penalties

This section has in contemplation the provisions of Section 331 on Prohibited Acts, and makes a violation of the prohibitions therein contained a criminal act, but only of the rank of a misdemeanor.

The penalties under the old Act were said to be so light as not to inspire any particular fear of consequences in violators. Penalties under the new Act are made sufficiently heavy.

Increased penalties are provided for "repeaters", and harsher penalties are imposed on persons who violate the provisions "with intent to defraud or mislead." Exemptions are provided for dealers who innocently receive and distribute illegal goods, or who can establish a guaranty that the goods in question did not violate the prohibitions of the Act.

For the first offender the maximum fine is \$1,000, or one year imprisonment, or both. For the second offender, the maximum fine is \$10,000, or imprisonment for not more than one year, or both. When the violation is "with the intent to defraud or mislead," the maximum is \$10,000 with a possible imprisonment of 3 years, or both. It is well to note that these increased penalties may be charged against a first offender if he has the necessary intent to violate the law.

Statute

PENALTIES

Sec. 333. (a) Any person who violates any of the provisions of section 301 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for

not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331, with intent to defraud or mislead, the penalty shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

(c) No person shall be subject to the penalties of subsection (a) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Secretary the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated section 331 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 331 (a), that such article is not adulterated or misbranded, within the meaning of this Act, designating this Act, or to the effect, in case of an alleged violation of section 331 (d), that such article is not an article which may not, under the provisions of section 344 or 355, be introduced into interstate commerce; or (3) for having violated section 331 (a), where the violation exists because the article is adulterated by reason of containing a coal-tar color not from a batch certified in accordance with regulations promulgated by the Secretary under this Act, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the coal-tar color, to the effect that such color was from a batch certified in accordance with the applicable regulations promulgated by the Secretary under this Act. 21 U.S.C.A. § 332.

Review of section 333:

- (a) 1. Is a misdemeanor classed as a crime?
2. By this section, who may be guilty of a misdemeanor?
3. For a simple violation of 331, what penalties may be imposed?
4. What penalties are imposed upon a person who has been subject to a prior conviction?

- (b) 1. If the violations have been with an intent to defraud or mislead, what penalties may be imposed?
2. Why is this deemed an aggravated offense?
- (c) 1. What persons are not subject to these penalties?
2. To avoid the penalties, what information must he furnish?
- (d) 1. State the requirements of a guaranty.
2. What are the defenses to an alleged violation of section 331 (d)?
3. State the defense where the article is adulterated by reason of containing a coal-tar color not from a batch properly certified.

Form of Continuing Guaranty approved by:

Toilet Goods Association

Proprietary Association

National Wholesale Druggists' Association

Federal Wholesale Druggists' Association

Chain Drug Stores

American Drug Manufacturers' Association

American Pharmaceutical Association

Continuing Guaranty

To _____

The undersigned, _____, whose address is _____, hereby guarantees that no food, drug, device or cosmetic constituting, or being part of, any shipment or other delivery now or hereafter made to you by the undersigned will, at the time of such shipment or delivery, be adulterated or misbranded within the meaning of the Federal Food, Drug, and Cosmetic Act, or within the meaning of any applicable state or municipal law in which the definitions of adulteration and misbranding are substantially the same as those contained in the Federal Food, Drug and Cosmetic Act, as said act and such laws are constituted and effective at the time of such shipment or delivery, or will be an article which may not, under the provisions of section 334 or 355 of said Act, be introduced into interstate commerce.

This guaranty shall be a continuing guaranty and shall be binding upon the undersigned with respect to all foods, drugs,

devices and cosmetics shipped or delivered to you by the undersigned (including goods in transit), before the receipt by you of written notice of the revocation thereof.

Signed

Dated ———

Seizure

Libel of Information

The word "libel" as used here should not be confused with the familiar phrase "libel and slander", which refers to defamation of character. Here it is the name of an initiatory pleading in a procedure the object of which is to condemn goods for some violation of the law on the part of the owner. Historically the term belongs to admiralty proceedings, and this statute provides that the procedure shall conform as nearly as may be, to the procedure in admiralty.

Venue, Consolidation, Trial by Jury

Trial by jury is specifically provided by division (a) of Section 334, to the effect that on the demand of either party an issue of fact joined in any case shall be tried by a jury. It is not the purpose of the Federal government in the enforcement of this Act to be unduly harsh to the manufacturer, especially one acting in good faith. This is apparent in this clause providing for change of venue and consolidation of trials. If proceedings involving the same claimant and the same issues of adulteration or misbranding are pending in two or more jurisdictions, consolidation of trials and certain changes in venue can be secured if application is made in reasonable time. In many situations this will prove advantageous to the manufacturer, especially if the trial can be had near his place of business, and where he is personally known.

Multiple Seizures Restricted

This section has been criticised because it restricts, under some circumstances, the number of seizures involving the same product. The hardships arising from multiple seizures have been well set forth in the case of the National Remedy Co. v. Hyde, Secretary of the Department of Agriculture, by

Associate Justice Robb of the Court of Appeals of the District of Columbia in 1931, 60 App.D.C. 252, 50 F.2d 1066, as follows:

"Inasmuch as every district attorney to whom the Department makes certification must institute appropriate proceeding, by indictment or libel for condemnation, or both, it is evident that, even though the findings of the Department are merely administrative, nevertheless, if such certification should be made to the district attorney in every district where the product might be found, the manufacturer would be crippled or ruined long before the final adjudication in the court could be had. Such a result, we think, was not contemplated by Congress, except possibly in unusual cases where drastic action would be necessary for the immediate protection of the public. Is this a case of that character? We think not."

In this case the Department of Agriculture had caused libels to be brought and seizures to be made in New York, Pittsburgh, Philadelphia, Baltimore, Oakland, Portland, Miami, and elsewhere.

Multiple Seizures Lawful

It should be noted also that the restriction applies to misbranding only and does not include adulteration. Also the restriction does not apply "when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding," or when there is an indication "that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer."

Statute

SEIZURE

Sec. 334. (a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate commerce, or at any time thereafter, on libel of information and condemned in any district court of the United

States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this Act, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this Act based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this Act, or (2) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court

of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

(c) The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruits or fresh vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained.

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this Act or the laws of the jurisdiction in which sold: *Provided*, That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this Act or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this Act under the supervision of an officer or employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under section 344 or 355, be introduced into interstate commerce, shall be disposed of by destruction.

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper

expenses, shall be awarded against the person, if any, intervening as claimant of the article.

(f) In the case of removal for trial of any case as provided by subsection (a) or (b)—

(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed. 21 U.S.C.A. § 334.

Review of section 334:

- (a)
1. What articles may be seized and condemned on libel of information?
 2. What courts have jurisdiction?
 3. In what instances are multiple seizures prohibited?
 4. Why is it an advantage to the manufacturer to limit the number of seizures?
 5. Does this protection apply to misbranding only?
 6. Name the situations in which the number of seizures is not restricted.
 7. Why should this provision not apply when the misbranded article is dangerous to health?
 8. Who determines that the misbranded article is dangerous to health?
 9. How is it determined?
 10. In what other situations may there be many seizures?
 11. Under what circumstances may the claimant secure a change of venue?
 12. What is meant by "a district of reasonable proximity to the claimant's principal place of business"?
 13. Why is the clause favorable to the claimant?
- (b)
1. What procedure shall be followed in these cases?
 2. When may an issue of fact be tried by a jury?
 3. Under what circumstances may proceedings be consolidated for trial?
 4. In what manner is a district selected for the trial?
 5. To what situation does the privilege of consolidation not apply?

- (c) 1. Who may secure a representative sample?
 - 2. How are such samples obtained?
 - 3. What provision is made as to fresh fruits and fresh vegetables?
- (d) 1. How are condemned articles disposed of?
 - 2. Under what circumstances may a condemned article be returned to the owner?
 - 3. What articles must be disposed of by destruction?
 - 4. This being a Federal Act, why must the owner in order to secure the return of the article give bond not to violate the laws of any State?
- (e) 1. Who must pay court costs and fees?
- (f) 1. What procedure must be observed, in case of removal for trial of any case?

Preliminary Hearing Before Criminal Proceedings

This provision for a preliminary hearing before report of criminal violation for prosecution constitutes a real protection against unfounded criminal prosecutions in food and drug cases. It applies, apparently, only to cases reported by the Secretary to any U.S. attorney for institution of criminal proceedings. If a U.S. attorney institutes a suit on his own initiative, then the preliminary hearing does not apply. As a matter of practice, U.S. attorneys seldom start such suits of their own accord.

Statute

HEARING BEFORE REPORT OF CRIMINAL VIOLATION

Sec. 335. Before any violation of this Act is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding. 21 U.S.C.A. § 335.

Review of section 335:

- 1. What protection is afforded the accused before criminal proceedings are instituted?
- 2. Does this protection apply only when a violation is reported by the Secretary to a United States attorney?

Report of Minor Violations

The Secretary of Agriculture need not report minor violations for institution of criminal, libel for condemnation, or injunction proceedings, if he believes that the public interest will be protected by a suitable written notice of warning.

This is an unusual provision. It gives legislative sanction to the exercise of discretion in instituting proceedings in order to avoid trivial or unnecessary litigation which might prove harsh or out of proportion to the offense committed.

Statute

REPORT OF MINOR VIOLATIONS

Sec. 336. Nothing in this Act shall be construed as requiring the Secretary to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this Act whenever he believes that the public interest will be adequately served by a suitable written notice or warning. 21 U.S.C.A. § 336.

Review of section 336:

1. What broad discretion is given the Secretary by this section?
2. When may he waive all court action?

Statute

PROCEEDINGS IN NAME OF UNITED STATES; PROVISION AS TO SUBPENAS

Sec. 337. All such proceedings for the enforcement, or to restrain violations, of this Act shall be by and in the name of the United States. Notwithstanding the provisions of section 654 of Title 28, subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district in any such proceeding. 21 U.S.C.A. § 337.

Review of section 337:

1. Distinguish between proceedings for the enforcement of violations and to restrain violations.
2. These proceedings must be brought in what name?
3. Subpoenas for witnesses may extend into what remote territory?

Statute

CHAPTER IV—FOOD

See Appendix 3, p. 460, for omitted sections.

CHAPTER V—DRUGS AND DEVICES

Adulterated Drugs and Devices

It is to be noted that drugs and devices are treated together in the chapter on adulteration and that Cosmetics is treated in Chapter VII and adulteration of Foods in Chapter IV. 21 U.S.C.A. § 342.

It is generally conceded that this chapter is a great step forward, especially since through it, therapeutic devices are made subject to Federal regulation. Great precaution is provided to protect the consumer in that drugs and devices must be prepared, packed and held under sanitary conditions; containers must be such as not to render the contents injurious to health; and if any coal-tar colors are used they must be from certified batches. In the former Act precaution was provided against understrength of drugs whereas the new Act also precludes overstrength.

Another new provision makes the Homœopathic Pharmacopœia the standard for Homœopathic drugs, which creates an added interest in the compilation.

Statute

CHAPTER V—DRUGS AND DEVICES

ADULTERATED DRUGS AND DEVICES

Sec. 351. A drug or device shall be deemed to be adulterated—

(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; or (2) if it has been prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or (3) if it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents

injurious to health; or (4) if it is a drug and it bears or contains, for purposes of coloring only, a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 504.

(b) If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality, or purity shall be made in accordance with the tests or methods of assay set forth in such compendium, except that whenever tests or methods of assay have not been prescribed in such compendium, or such tests or methods of assay as are prescribed are, in the judgment of the Secretary, insufficient for the making of such determination, the Secretary shall bring such fact to the attention of the appropriate body charged with the revision of such compendium, and if such body fails within a reasonable time to prescribe tests or methods of assay which, in the judgment of the Secretary, are sufficient for purposes of this paragraph, then the Secretary shall promulgate regulations prescribing appropriate tests or methods of assay in accordance with which such determination as to strength, quality, or purity shall be made. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality, or purity therefor set forth in such compendium, if its difference in strength, quality, or purity from such standard is plainly stated on its label. Whenever a drug is recognized in both the United States Pharmacopœia and the Homœopathic Pharmacopœia of the United States it shall be subject to the requirements of the United States Pharmacopœia unless it is labeled and offered for sale as a homœopathic drug, in which case it shall be subject to the provisions of the Homœopathic Pharmacopœia of the United States and not to those of the United States Pharmacopœia.

(c) If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.

(d) If it is a drug and any substance has been (1) mixed or packed therewith so as to reduce its quality or strength or (2) substituted wholly or in part therefor. 21 U.S.C.A. § 351.

Review of section 351 :

- (a)
 - 1. State the 4 parts of the definition of adulterated drug or device.
 - 2. In part one; state the 3 conditions that constitute adulteration.
 - 3. In part two, determine the elements of handling which constitute adulteration.
 - 4. Do parts 3 and 4 refer to drugs only?
 - 5. When may the condition of the container constitute adulteration?
 - 6. What is the provision as to coal-tar coloring?
 - 7. What are the provisions of 354?
- (b)
 - 1. What constitutes adulteration if the name of a drug is recognized in an official compendium?
 - 2. How is the strength, quality or purity of such drug determined?
 - 3. May the Secretary determine that such tests are insufficient?
 - 4. When may the Secretary request a revision of a compendium?
 - 5. When may a label state a different standard of strength, quality, or purity than defined in an official compendium?
 - 6. What problems arise when a drug is recognized in both the U. S. Pharmacopœia and the Homœopathic Pharmacopœia?
- (c)
 - 1. Give an example of adulteration under subdivision (c).
- (d)
 - 1. What constitutes adulteration under subdivision (d)?
 - 2. How many provisions of section 351 refer to drugs only?

Misbranded Drugs and Devices

In the section on misbranding of drugs and devices the same plan is followed as in that on adulteration, that is, only drugs and devices are here considered, leaving Foods and Cosmetics for separate treatment.

Any article is considered to be misbranded "If its labeling is false or misleading in any particular." Under the old law to constitute misbranding the representations had to be "false and fraudulent." At all times proof of fraud is difficult, so the new wording removes a great obstacle to prosecutions.

The new phrase, "false or misleading in any particular" can be made to include a wide range of situations.

Habit Forming Drugs

Division (d) of this section is in relation to habit forming drugs, and is intended to provide protection for the consumer. Two distinct duties are imposed on the manufacturer: (1) the label must bear the name, quantity and percentage of such substance or derivative, and (2) in juxtaposition therewith must be the statement, "Warning—may be habit forming." A retailer, may bring himself under the requirements of this section in certain situations where he buys in bulk and repackages for sale.

Name of Drug not in Official Compendium

If a drug is not designated by a name in an official compendium, then the common or usual name of the drug must be on the label, and if it is made up from two or more ingredients, the common or usual name of each must be stated. It was anticipated that the latter part of this section might, in some instances, prove impracticable, so the Secretary is given authority to grant exceptions.

Directions for Use and Warnings

Division (f) of this Section makes imperative adequate directions for use. Warnings against use in certain cases also are obligatory. "Adequate warnings against use in those pathological conditions or by children, where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application in such manner or form, as are necessary for the protection of users." In this case also, concerning the requirement of "adequate direction for use," the Secretary may promulgate regulations where the requirement is impracticable.

Drug Recognized in Official Compendium

If a manufacturer sells a drug recognized in an official compendium, it must be packaged and labeled as therein prescribed. If a drug is recognized in both the U. S. and the Homœo-

pathic Pharmacopœias it is subject to the requirements of the U. S. Pharmacopœia with respect to packaging and labeling, unless it is offered for sale as a Homœopathic drug, in which case it is subject to the provisions of the Homœopathic Pharmacopœia.

Drug Liable to Deterioration

Authority is given to the Secretary to determine whether a drug is liable to deterioration. He also must promulgate regulations as to how such drug shall be packaged, and what statements of precaution must be placed on the label.

Miscellaneous Misbranding Problems

In divisions (i) and (j) are stated miscellaneous acts which constitute misbranding. It constitutes misbranding "if it is a drug and its container is so made, formed or filled as to be misleading; or (2) if it is an imitation of another drug; or (3) if it is offered for sale under the name of another drug," and "If it is dangerous to health when used in the dosage, or with frequency or duration prescribed, recommended, or suggested in the labeling thereof."

Statute

MISBRANDED DRUGS AND DEVICES

Sec. 352. A drug or device shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

(b) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(c) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(d) If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaine, barbituric acid, beta-eucaine, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Secretary, after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name, quantity, and percentage of such substance or derivative and in juxtaposition therewith the statement "Warning—May be habit forming".

(e) If it is a drug and is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be; and (2), in case it is fabricated from two or more ingredients, the common or usual name of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including, whether active or not, the name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein: *Provided*, That to the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary.

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided*, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement.

(g) If it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein: *Provided*, That the method of packing may be modified with the consent of the Secretary. Whenever a drug is recognized in both the United States

Pharmacopœia and the Homœopathic Pharmacopœia of the United States, it shall be subject to the requirements of the United States Pharmacopœia with respect to packaging and labeling unless it is labeled and offered for sale as a homœopathic drug, in which case it shall be subject to the provisions of the Homœopathic Pharmacopœia of the United States, and not to those of the United States Pharmacopœia.

(h) If it has been found by the Secretary to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the Secretary shall by regulations require as necessary for the protection of the public health. No such regulation shall be established for any drug recognized in an official compendium until the Secretary shall have informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.

(i) (1) If it is a drug and its container is so made, formed, or filled as to be misleading; or (2) if it is an imitation of another drug; or (3) if it is offered for sale under the name of another drug.

(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof. 21 U.S.C.A. § 352.

Review of section 352:

- (a) 1. How comprehensive is the provision, "false or misleading in any particular"?
- (b) 1. A label must contain what information concerning persons?
 - 2. What information is required concerning the contents?
 - 3. What is the provision for "reasonable variations"?
- (c) 1. How conspicuous must the label be made?
- (d) 1. What habit forming drugs are named?
 - 2. What must appear on the label of these drugs?
 - 3. Must the exact words be followed?
- (e) 1. If a drug is not designated solely by a name recognized in an official compendium, what facts must appear on the label?
 - 2. When may exemptions be established?

- (f) 1. What directions for use must be on the label?
2. What warnings must be on the label?
3. When may the Secretary promulgate exemptions?
- (g) 1. If the name of a drug is recognized in an official compendium, how must it be packaged and labeled?
2. How may the method of packing be modified?
3. When may a drug be subject to the requirements of the Homœopathic Pharmacopœia as to packaging and labeling?
- (h) 1. What are the provisions relating to a drug liable to deterioration?
- (i) 1. Explain the 3 provisions on misbranding in this section.
- (j) 1. Explain the misbranding prohibition relating to improper instructions as to use.

Exemptions in Case of Drugs and Devices

The requirements concerning the misbranding of drugs and devices are many and quite exacting, but the Secretary is given authority to make regulations in situations in which adherence to the rules is impracticable. In section 353 (a) the Secretary is given authority to promulgate regulations concerning exemption from labeling and packaging requirements of drugs and devices which are to be processed, labeled, or repacked in substantial quantities at an establishment other than the one where they were originally packed.

Prescriptions of Physicians, Dentists and Veterinarians

In Section 353 (b) is an exemption from the requirements of 352(b) and (e), and from Section 352(d) for licensed physicians, dentists and veterinarians for a drug dispensed on a written prescription signed by the physician, dentist or veterinarian, in case such prescription is marked by the writer thereof as not refillable, or if its refilling is prohibited by law. In such case the label must bear the name and place of business of the dispenser and the serial number and date of such prescription as well as the name of the physician, dentist or veterinarian. This exemption does not include "a drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail."

*Statute***EXEMPTIONS IN CASE OF DRUGS AND DEVICES**

Sec. 352. (a) The Secretary is hereby directed to promulgate regulations exempting from any labeling or packaging requirement of this Act drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such drugs and devices are not adulterated or misbranded under the provisions of this Act upon removal from such processing, labeling, or repacking establishment.

(b) A drug dispensed on a written prescription signed by a physician, dentist, or veterinarian (except a drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail), shall if—

(1) such physician, dentist, or veterinarian is licensed by law to administer such drug, and

(2) such drug bears a label containing the name and place of business of the dispenser, the serial number and date of such prescription, and the name of such physician, dentist, or veterinarian,

be exempt from the requirements of section 352 (b) and (c), and (in case such prescription is marked by the writer thereof as not refillable or its refilling is prohibited by law) of section 352 (d). 21 U.S.C.A. § 353.

Review of section 352:

(a) 1. What drugs and devices may be exempt from labeling and packaging requirements?

2. How is such exemption secured?

3. What conditions must be met before exemption may be obtained?

(b) 1. What exemption is made for certain professional men?

2. The prescription must contain what facts?

3. What are the requirements of 352 (b), (d), and (e)?

*Statute***CERTIFICATION OF COAL-TAR COLORS FOR DRUGS**

Sec. 354. The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and

suitable for use in drugs for purposes of coloring only and for the certification of batches of such colors, with or without harmless diluents. 21 U.S.C.A. § 354.

New Drugs

The regulation of new drugs is an entirely new phase of the law the need for which became apparent in 1937 while the bill was pending, because of the sulfanilamide development in which more than one hundred deaths occurred. Senate Document No. 124, 75th Congress gives a complete account of this.

The Section forbids the introduction, or delivery for introduction, into interstate commerce of any new drug without the approval of an application therefor. The application section 355(b) must contain (1) "Full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for the manufacture, processing, and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug."

Divisions (c), (d), (e), (f), (g), and (i) state the details in connection with the application. They cover, among other things, the effective date after filing, postponement of the effective date, investigation of the application, hearing on it, objection to contents, suspension of the effectiveness of the application, order refusing an application and the manner of serving such order.

Division (h) gives directions for an appeal by the applicant from an order of the Secretary refusing an application, or from a suspension of the effectiveness of an application. Such an appeal may be to the District Court of the U. S. or to the District Court of the U. S. for the District of Columbia.

Section 355 went into effect on approval and during the first year more than 1000 applications were filed, which demonstrates the importance of the Section to the trade. This Section is an example of preventive control of drugs, and will doubtless exert a great influence on the progress of therapeutics. If a drug is rejected its use will be destroyed, or at least postponed until the applicant makes alterations and changes

which meet the demands of the Secretary. The burden is placed upon the applicant to satisfy the Secretary as to the exact compliance of the new drug with all the requirements so carefully outlined.

Statute

NEW DRUGS

Sec. 355. (a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

(b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such person shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

(c) An application provided for in subsection (b) shall become effective on the sixtieth day after the filing thereof unless prior to such day the Secretary by notice to the applicant in writing postpones the effective date of the application to such time (not more than one hundred and eighty days after the filing thereof) as the Secretary deems necessary to enable him to study and investigate the application.

(d) If the Secretary finds, after due notice to the applicant and giving him an opportunity for a hearing, that (1) the investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b), do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; (3) the methods used in, and the facilities and controls used for, the

manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity; or (4) upon the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions, he shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

(e) The effectiveness of an application with respect to any drug shall, after due notice and opportunity for hearing to the applicant, by order of the Secretary be suspended if the Secretary finds (1) that clinical experience, tests by new methods, or tests by methods not deemed reasonably applicable when such application became effective show that such drug is unsafe for use under the conditions of use upon the basis of which the application became effective, or (2) that the application contains any untrue statement of a material fact. The order shall state the findings upon which it is based.

(f) An order refusing to permit an application with respect to any drug to become effective shall be revoked whenever the Secretary finds that the facts so require.

(g) Orders of the Secretary issued under this section shall be served (1) in person by any officer or employee of the department designated by the Secretary or (2) by mailing the order by registered mail addressed to the applicant or respondent at his last-known address in the records of the Secretary.

(h) An appeal may be taken by the applicant from an order of the Secretary refusing to permit the application to become effective, or suspending the effectiveness of the application. Such appeal shall be taken by filing in the district court of the United States within any district wherein such applicant resides or has his principal place of business, or in the District Court of the United States for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be set aside. A copy of such petition shall be forthwith served upon the Secretary, or upon any officer designated by him for that purpose, and thereupon the Secretary shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm or set aside such order. No objection to the order of the Secretary

shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If any person shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified findings which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the setting aside of the original order. The judgment and decree of the court affirming or setting aside any such order of the Secretary shall be final, subject to review as provided in sections 128, 239, and 240 of the Judicial Code, as amended (U.S.C., 1934 ed., title 28, secs. 225, 346, and 347), and in section 7, as amended, of the Act entitled "An Act to establish a Court of Appeals for the District of Columbia", approved February 9, 1893 (D. C. Code, title 18, sec. 26). The commencement of proceedings under this subsection shall not, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order.

(i) The Secretary shall promulgate regulations for exempting from the operation of this section drugs intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety of drugs. 21 U.S.C.A. § 355.

Review of section 355:

- (a) 1. What is forbidden by division (a)?
2. How is "new drug" defined?
- (b) 1. An application with respect to a new drug must state what essential facts?
- (c) 1. How soon shall such application become effective?
- (d) 1. Under what circumstances may the secretary refuse a permit?
2. Is the burden entirely on the manufacturer to satisfy the Secretary that all requirements have been met?

- (e) 1. Under what circumstances may the effectiveness of an application be suspended?
- 2. Why should the order state the findings upon which the suspension is based?
- (f) 1. What is the purpose of division (f)?
- (g) 1. How may an order issued by the Secretary be served?
- (h) 1. State the procedure for an appeal by an applicant from an adverse order by the Secretary.
- 2. Under what circumstances may the Secretary modify his findings?
- (i) 1. State the special provision for drugs used for investigational purposes only.

CHAPTER VI—COSMETICS

Legal Regulations in the Cosmetic Industry

The Chapter on Cosmetics is an entirely new phase of the law, not having had a place in the old law. It resulted from the years of criticism of the lack of protection to the consumer.

The definition is given in Section 321 (i). The outline of the Chapter is similar to that followed in those on Drugs and Foods. It covers adulterated and misbranded cosmetics, regulations of exemptions, and certification of coal-tar colors. This Section became effective upon the approval of the bill, except as to the hair dye requirements for which 90 days were allowed in which to dispose of stock and to make the required adjustments.

Adulterated or Misbranded Cosmetics

Sections 361 and 362, given later, though similar to the drug and food provisions, should be carefully studied. It should be noted that the provision does not apply to coal-tar hair dye, which contains a prescribed "Warning" the exact words of which are furnished in the statute. Restrictions as to hair dyes are made very clear. As with food, drug, and device, the same broad statement applies—that a cosmetic is misbranded "If its labeling is false or misleading in any particular." The label must also contain "the name and place of business of the manufacturer, packer, or distributor; and an

accurate statement of the quantity of the contents in terms of weight, measure, or numerical count." Also the words of the label must be sufficiently conspicuous, and the container must not be "so made, formed, or filled as to be misleading." It is well to be familiar with the exact words of the statute.

Statute

COSMETICS

ADULTERATED COSMETICS

Sec. 361. A cosmetic shall be deemed to be adulterated—

(a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual: *Provided*, That this provision shall not apply to coal-tar hair dye, the label of which bears the following legend conspicuously displayed thereon: "Caution—This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness." and the labeling of which bears adequate directions for such preliminary testing. For the purposes of this paragraph and paragraph (e) the term "hair dye" shall not include eyelash dyes or eyebrow dyes.

(b) If it consists in whole or in part of any filthy, putrid, or decomposed substance.

(c) If it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

(d) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

(e) If it is not a hair dye and it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 604. 21 U.S.C.A. § 361.

Review of section 361:

- (a) 1. What is the purpose of this section?
- 2. When is a cosmetic deemed adulterated?
- 3. What exception is stated?
- 4. What warning must be placed on the label?
- 5. What is included in the term "hair dye"?
- 6. Explain adulteration as given in divisions (b), (c), (d), and (e).
- 7. What are the provisions of section 364?

Statute

MISBRANDED COSMETICS

Sec. 362. A cosmetic shall be deemed to be misbranded—

- (a) If its labeling is false or misleading in any particular.
- (b) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.
- (c) If any word, statement, or other information required by or under authority of this Act to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.
- (d) If its container is so made, formed, or filled as to be misleading. 21 U.S.C.A. § 362.

Review of section 362:

- (a) 1. When is a cosmetic deemed misbranded?
- 2. How inclusive is the phrase "misleading in any particular"?
- (b) 1. If in package form, how must it be labeled?
- 2. What reasonable variations are allowed?
- 3. How are exemptions as to small packages prescribed?
- (c) 1. Explain the requirement as to a conspicuous label.

- (d) 1. When may the condition of the container constitute misbranding?

Statute

REGULATIONS MAKING EXEMPTIONS

Sec. 363. The Secretary shall promulgate regulations exempting from any labeling requirement of this Act cosmetics which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such cosmetics are not adulterated or misbranded under the provisions of this Act upon removal from such processing, labeling, or repacking establishment. 21 U.S.C.A. § 363.

Review of section 363:

1. State the authority of the Secretary to exempt cosmetics from the labeling requirements.
2. What cosmetics may be exempt?

Statute

CERTIFICATION OF COAL-TAR COLORS FOR COSMETICS

Sec. 364. The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in cosmetics and for the certification of batches of such colors, with or without harmless diluents. 21 U.S.C.A. § 364.

Review of section 364:

1. Why has the coal-tar product received so much attention in this Act?
2. What abuse is regulated by this section?

CHAPTER VII—GENERAL ADMINISTRATIVE PROVISION

As stated several times in the statute, authority to promulgate regulations for the enforcement of the Act is conferred upon the Secretary of Agriculture.

However in Chapter VIII, which deals with control of exports and imports, the Secretary of the Treasury and the Sec-

retary of Agriculture are given authority jointly to prescribe regulations to enforce provisions therein contained.

The hearings authorized or required by the law shall be conducted by the Secretary of Agriculture, or by an officer or employee designated for the duty. Proper procedure is outlined as to public hearings on a proposal to issue, amend, or repeal any regulations as provided in Section 701(e).

Any person adversely affected by an order may within 90 days appeal to the Circuit Court of Appeals of the United States. This court is designated because of the probability that its decisions would have greater uniformity than those of the District Court of the United States. From the decision of the Circuit Court of Appeals of the United States there may be a final appeal to the Supreme Court of the United States.

Statute

CHAPTER VII—GENERAL ADMINISTRATIVE PROVISIONS

REGULATIONS AND HEARINGS

Sec. 371. (a) The authority to promulgate regulations for the efficient enforcement of this Act, except as otherwise provided in this section, is hereby vested in the Secretary.

(b) The Secretary of the Treasury and the Secretary of Agriculture shall jointly prescribe regulations for the efficient enforcement of the provisions of section 381, except as otherwise provided therein. Such regulations shall be promulgated in such manner and take effect at such time, after due notice, as the Secretary of Agriculture shall determine.

(c) Hearings authorized or required by this Act shall be conducted by the Secretary or such officer or employee as he may designate for the purpose.

(d) The definitions and standards of identity promulgated in accordance with the provisions of this Act shall be effective for the purposes of the enforcement of this Act, notwithstanding such definitions and standards as may be contained in other laws of the United States and regulations promulgated thereunder.

(e) The Secretary, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regu-

lation contemplated by any of the following sections of this Act: 341, 343 (j), 344 (a), 346 (a) and (b), 351 (b), 352 (d), 352 (h), 354, and 364. The Secretary shall give appropriate notice of the hearing, and the notice shall set forth the proposal in general terms and specify the time and place for a public hearing to be held thereon not less than thirty days after the date of the notice, except that the public hearing on regulations under section 344 (a) may be held within a reasonable time, to be fixed by the Secretary, after notice thereof. At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Secretary shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Secretary shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. No such order shall take effect prior to the ninetieth day after it is issued, except that if the Secretary finds that emergency conditions exist necessitating an earlier effective date, then the Secretary shall specify in the order his findings as to such conditions and the order shall take effect at such earlier date as the Secretary shall specify therein to meet the emergency.

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. The summons and petition may be served at any place in the United States. The Secretary, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Secretary based his order.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and condi-

tions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 247 of Title 28, as amended.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

(g) A certified copy of the transcript of the record and proceedings under subsection (e) shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, libel for condemnation, exclusion of imports, or other proceeding arising under or in respect to this Act, irrespective of whether proceedings with respect to the order have previously been instituted or become final under subsection (f). 21 U.S.C.A. § 371.

Review of Section 371:

- (a) 1. Who has authority to promulgate regulations?
- (b) 1. What is the subject matter of 371?
 - 2. Who is empowered to prescribe regulations to enforce 371?
- (c) 1. Who may conduct hearings?
- (d) 1. How effective are the definitions and standards of identity herein promulgated?

- (e) 1. Under what circumstances may the Secretary hold a public hearing upon a proposal to issue, amend, or repeal any regulation?
- 2. What sections may be involved in this hearing?
- 3. What notice must be given of the hearing?
- 4. Who may be heard at the hearing?
- 5. What action must the Secretary take after the hearing?
- 6. How soon shall the order take effect?
- (f) 1. Who may secure a judicial review of the order?
- 2. How and where is the review conducted?
- 3. When may additional evidence be presented?
- 4. In what manner may the court change the order of the Secretary?
- 5. May the judgment of the Court of Appeals be reviewed by the Supreme Court of the U. S.?
- 6. What are the consequences if there is a change in office of the Secretary?
- (g) 1. What uses may be made of a certified copy of the transcript of the record and proceedings under subsection (e)?

Examinations and Investigations

The Secretary is authorized to conduct examinations and investigations for the purpose of carrying out this Act. In doing so he may use not only the officers and employees of the Department, but also officers and employees of any State, Territory or political subdivision thereof, who shall be duly commissioned by the Secretary as officers of the Department.

If a sample of a food, drug, or cosmetic has been taken for analysis, the Secretary shall, upon the request of a person named on the label, or his attorney or agent, provide the person making such demand with a part of the official sample. In accordance with the old law only a record of the results of the analysis or examination were furnished to the interested party.

Statute

EXAMINATIONS AND INVESTIGATIONS

Sec. 372. (a) The Secretary is authorized to conduct examinations and investigations for the purposes of this Act

through officers and employees of the Department or through any health, food, or drug officer or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department. In the case of food packed in a Territory the Secretary shall attempt to make inspection of such food at the first point of entry within the United States when, in his opinion and with due regard to the enforcement of all the provisions of this Act, the facilities at his disposal will permit of such inspection. For the purposes of this subsection the term "United States" means the States and the District of Columbia.

(b) Where a sample of a food, drug, or cosmetic is collected for analysis under this Act the Secretary shall, upon request, provide a part of such official sample for examination or analysis by any person named on the label of the article, or the owner thereof, or his attorney or agent; except that the Secretary is authorized, by regulations, to make such reasonable exceptions from, and impose such reasonable terms and conditions relating to, the operation of this subsection as he finds necessary for the proper administration of the provisions of this Act.

(c) For purposes of enforcement of this Act, records of any department or independent establishment in the executive branch of the Government shall be open to inspection by any official of the Department of Agriculture duly authorized by the Secretary to make such inspection. 21 U.S.C.A. § 372.

Review of section 372:

- (a) 1. How may the Secretary conduct examinations and investigations?
- 2. In case of food packed in a Territory, where should the inspection be made?
- (b) 1. Who may secure a part of an official sample?
- 2. What regulations may the Secretary impose in relation to samples?
- (c) 1. In order to enforce this Act, what records may be inspected?

Records of Interstate Commerce Shipments

Every effort has been made to make it possible for the Secretary, through his officers, to enforce the Act without hindrance or delay. For this purpose Section 373 provides

that "carriers engaged in interstate commerce and persons receiving food, drugs, devices or cosmetics in interstate commerce or holding such articles so received" shall permit duly authorized officers at reasonable times "to have access to and to copy all records showing the movement in interstate commerce, of any food, drug, device or cosmetic, or the holding thereof during or after such movements, and the quantity, shipper, and consignee." A penalty is imposed for refusal by the carrier to comply. It is provided also "That evidence obtained under this Section shall not be used in a criminal prosecution of the person from whom obtained."

Statute

RECORDS OF INTERSTATE SHIPMENT

Sec. 373. For the purpose of enforcing the provisions of this Act, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall, upon the request of an officer or employee duly designated by the Secretary, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates: *Provided*, That evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained: *Provided further*, That carriers shall not be subject to the other provisions of this Act by reason of their receipt, carriage, holding, or delivery of food, drugs, devices, or cosmetics in the usual course of business as carriers. 21 U.S.C. A. § 373.

Review of section 373:

1. What records may be inspected and copied?
2. These records should contain what facts?
3. What use cannot be made of the evidence so obtained?

4. From what additional liability is the carrier exempted?

Factory Inspection

The Factory Inspection Section 374 is an additional aid to the enforcement of this Act in that it gives to the Secretary of Agriculture power to appoint officers "to inspect, at reasonable times such factory, warehouse, establishment, or vehicle and pertinent equipment, finished and unfinished materials, containers, and labeling therein" as he deems necessary.

Reports of factory inspections should prove a great aid in discovering violations and to officers in planning enforcement of the law. There are some sorts of violation, especially in regard to foods, which are difficult to discover without the inspections thus provided. In making an inspection officers must first make a suitable request of the owner, and then the work must be carried out at a reasonable time.

Statute

FACTORY INSPECTION

Sec. 374. For purposes of enforcement of this Act, officers or employees duly designated by the Secretary, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. 21 U.S.C.A. § 374.

Review of section 374:

1. For what purposes may officers enter places of storage?
2. When may officers enter a vehicle?
3. Why is factory inspection necessary?

4. Should the officers make a request and obtain permission before entering?

Statute

PUBLICITY

Sec. 375. (a) The Secretary shall cause to be published from time to time reports summarizing all judgments, decrees, and court orders which have been rendered under this Act, including the nature of the charge and the disposition thereof.

(b) The Secretary may also cause to be disseminated information regarding food, drugs, devices, or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer. Nothing in this section shall be construed to prohibit the Secretary from collecting, reporting, and illustrating the results of the investigations of the Department. 21 U.S.C.A. § 375.

Review of section 375:

(a) 1. What published reports shall the Secretary make?

(b) 1. What information shall the Secretary disseminate?

Statute

COST OF CERTIFICATION OF COAL-TAR COLORS

Sec. 376. The admitting to listing and certification of coal-tar colors, in accordance with regulations prescribed under this Act, shall be performed only upon payment of such fees, which shall be specified in such regulations, as may be necessary to provide, maintain, and equip an adequate service for such purposes. 21 U.S.C.A. § 376.

Review of section 376:

1. What fees may be collected?

CHAPTER VIII—IMPORTS AND EXPORTS

The regulations in regard to imports and exports are the same as under previous laws with the exception that they now extend to therapeutic devices and cosmetics as well as to food and drugs. In case of imported or exported articles

falling within the classification of this law, the Secretary of Treasury shares with the Secretary of Agriculture in its enforcement. It is his duty to deliver to the Secretary of Agriculture samples of food, drugs, devices and cosmetics upon demand.

Statute

IMPORTS AND EXPORTS

Sec. 381. (a) The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture and have the right to introduce testimony. If it appears from the examination of such samples or otherwise that (1) such article has been manufactured, processed, or packed under insanitary conditions, or (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or (3) such article is adulterated, misbranded, or in violation of section 505, then such article shall be refused admission. This paragraph shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under section 2 of the Act of May 26, 1922, as amended (U. S.C., 1934 edition, title 21, sec. 173).

(b) The Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any such article refused admission, unless such article is exported by the consignee within three months from the date of notice of such refusal, under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee any such article pending examination and decision in the matter on execution of a bond as liquidated damages for the amount of the full invoice value thereof together with the duty thereon and on refusing for any cause to return such article or any part thereof to the custody of the Secretary of the Treasury when demanded for the purpose of excluding it from the country or for any other purpose, such consignee shall forfeit the full amount of the bond as liquidated damages.

(c) All charges for storage, cartage, and labor on any article which is refused admission or delivery shall be paid by

the owner or consignee and in default of such payment shall constitute a lien against any future importations made by such owner or consignee.

(d) A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this Act if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this Act. 21 U.S.C.A. § 381.

Review of section 381 :

- (a) 1. What is the purpose of Section 381?
- 2. Why is the Secretary of the Treasury involved?
- 3. Under what circumstances may an article be refused admission?
- 4. Why does this Section not prohibit the admission of narcotic drugs?
- (b) 1. For what reasons will the Secretary of the Treasury destroy the articles?
- 2. Under what circumstances may the Secretary of the Treasury deliver the article to the consignee pending examination and decision?
- (c) 1. By whom shall all charges be paid?
- (d) 1. When is an export not deemed adulterated or misbranded?

Operative Dates Postponed

The following Act, approved June 23, 1939, provides a temporary postponement of several sections relating mostly to labeling, due to requests of manufacturers for more time in which to make the required adjustments. A careful check should be made to determine the sections to which this applies.

To provide for temporary postponement of the operations of certain provisions of the Federal Food, Drug, and Cosmetic Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That
(a) the effective date of the following provisions of the Fed-

ARTHUR DRUGS

eral Food, Drug, and Cosmetic Act is hereby postponed until January 1, 1940: Sections 342 (c); 343 (e) (1); 343 (g), (h), (i), (j), and (k); 351 (a) (4); 352 (b), (d), (e), (f), (g), and (h); 601 (e); and 602 (b).

(b) The Secretary of Agriculture shall promulgate regulations further postponing to July 1, 1940 the effective date of the provisions of sections 343 (e) (1); 343 (g), (h), (i), (j), and (k); 352 (b), (d), (e), (f), (g), and (h), and 602 (b) of such Act with respect to lithographed labeling which was manufactured prior to February 1, 1939, and to containers bearing labeling which, prior to February 1, 1939, was lithographed, etched, stamped, pressed, printed, fused or blown on or in such containers, where compliance with such provisions would be unduly burdensome by reason of causing the loss of valuable stocks of such labeling or containers, and where such postponement would not prevent the public interest being adequately served: *Provided*, That in no case shall such regulations apply to labeling which would not have complied with the requirements of the Food and Drugs Act of June 30, 1906, as amended.

Sec. 2. (a) The provisions of section 8, paragraph fifth, under the heading "In the case of food:" of the Food and Drugs Act of June 30, 1906, as amended, and regulations promulgated thereunder, and all other provisions of such Act to the extent that they may relate to the enforcement of such section 8 and of such regulations, shall remain in force until January 1, 1940.

(b) The provisions of such Act of June 30, 1906, as amended, to the extent that they impose, or authorize the imposition of, any requirement imposed by section 403 (k) of the Federal Food, Drug, and Cosmetic Act, shall remain in force until January 1, 1940.

(c) Notwithstanding the provisions of section 1 of this Act, such section shall not apply—

(1) to the provisions of section 502 (d) and (e) of the Federal Food, Drug, and Cosmetic Act, insofar as such provisions relate to any substance named in section 8, paragraph second, under the heading "In the case of drugs:" of the Food and Drugs Act of June 30, 1906, as amended, or a derivative of any such substance; or

(2) to the provisions of section 502 (b), (d), (e), (f), (g), and (h) of the Federal Food, Drug, and Cosmetic Act,

insofar as such provisions relate to drugs to which section 505 of such Act applies.

Sec. 3. Section 352 (d) of the Federal Food, Drug, and Cosmetic Act is hereby amended by striking out the words "name, quantity, and percentage" where they appear therein and substituting in lieu thereof "name, and quantity or proportion".

Approved, June 23, 1939.

DIVISION 2

WHEELER-LEA BILL

The Wheeler-Lea Bill (S. 1077) is an amendment to the Federal Trade Commission Act. It was approved March 21, 1938, and for the most part went into effect May 21, 1938. This Bill was approved before the Copeland Bill was, and is therefore the first step in the revision of the Pure Food and Drugs Law. It is a compromise measure. Many of the proponents of revision wished to have the regulation of advertising a part of the Food, Drug and Cosmetic Act, but as there were many who objected, the Wheeler-Lea Bill was passed to care for that phase of the matter.

The effect of the Wheeler-Lea Bill is to put all advertising which has to do with foods, drugs, therapeutic devices, and cosmetics, with the exception of labeling, under the exclusive control of the Federal Trade Commission.

Acts Made Unlawful

Section 12 makes it unlawful for any person, partnership or corporation to disseminate or cause to be disseminated any false advertisement, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices or cosmetics.

Such false advertising must not employ the United States mails or be introduced into interstate commerce by any other means.

The Act states that the dissemination or causing to be disseminated any false advertisement herein prohibited "shall be an unfair or deceptive act or practice in commerce."

The Wheeler-Lea Act

False Advertisement of Food, Drugs, Devices, or Cosmetics as Unfair or Deceptive Act or Practice and Unlawful.

Statute

Sec. 52. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5. 15 U.S.C. A. § 52.

Review of section 52:

- (a) 1. What acts are made unlawful?
2. Who are forbidden to do the acts?
3. Why are these acts forbidden as to U. S. mails and as to commerce?
4. Such advertising to be unlawful must be for what purposes?
- (b) 1. Why is such advertising made “an unfair or deceptive act or practice”?

Injunctive Proceedings

Special power is given to the Federal Trade Commission if it “would be to the interest of the public” to secure an injunction restraining any person, partnership or corporation which is engaged in, or about to engage in the dissemination of unlawful advertising. This is secured prior to the issuance of a complaint by the Commission and is operative until some final action is taken. The suit is brought in the U. S.

District Court or the U. S. Court of any Territory in the District in which the defendant resides or transacts business. This provision is for the purpose of protecting consumers from false advertising while proceedings are in progress. An exception is provided in case of certain publications which would otherwise be delayed on regular publication days.

Statute

INJUNCTIVE PROCEEDINGS TO RESTRAIN SUCH ADVERTISING

Sec. 53. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance

of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction. 15 U.S.C.A. § 53.

Review of section 53:

- (a) 1. When may the Commission secure a temporary injunction?
- 2. In what courts may the suit be brought?
- 3. Explain the meaning of "temporary injunction."
- 4. Where shall such suit be brought?
- (b) 1. What publications are designated?
- 2. When may the court exclude an issue from the operation of the restraining order?

Penalties Imposed

The penalties provided are sufficiently severe, being a fine of not more than \$5000, or imprisonment for not more than six months. If there has been a prior conviction of the same party for the same offense, then the maximum fine is \$10,000 and imprisonment for not more than one year or both.

In division (b) an exception is provided in favor of the publisher, radio-broadcast licensee, or agency or medium for dissemination of advertising that furnishes on request of the commission "the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement."

Statute

PENALTIES FOR FALSE ADVERTISING

Sec. 54. (a) Any person, partnership, or corporation who violates any provision of section 12 (a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is

for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than \$10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment: Provided, That for the purposes of this section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907, as amended, shall be conclusively presumed not injurious to health at the time the same leave official "establishments".

(b) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement. 15 U.S.C.A. § 54.

Review of section 54:

- (a) 1. Is the violation of this Act a criminal act?
2. For what 3 reasons may the advertising be unlawful?
3. What fine or imprisonment may be imposed?
4. What are the changes in penalties if there has been a prior conviction?
5. What exception is provided as to meats?
- (b) 1. How may the person disseminating such advertisement secure exemption?
2. How may an advertising agency secure exemption?

Definition of Advertisement

According to Section 55, for the purpose of this Act, a false advertisement is an advertisement that is "misleading in a material respect" but excludes advertising by means of "labeling." This is a broad definition and was so drawn to avoid difficulties such as arose under the Food and Drugs Act of 1906.

In determining whether an advertisement is misleading, there may be taken into consideration not only representations made or implied, but also the extent to which the advertisement fails to reveal material facts, or consequences which may result from use of the commodity.

The definitions of "food", "drug", "device", and "cosmetic" are the same in this Act as in Section 321 of the Food, Drug, and Cosmetic Act, and have been explained under that Section.

Statute

DEFINITIONS OF FALSE ADVERTISEMENT, FOOD, DRUGS, DEVICES, COSMETICS

Sec. 55. For the purposes of sections 52, 53, and 54—

(a) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

(b) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(c) The term "drug" means (1) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

(d) The term "device" (except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure of any function of the body of man or other animals.

(e) The term "cosmetic" means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap. 15 U.S.C.A. § 55.

Review of section 55:

- (a) 1. Define "false advertisement."
2. Why is "labeling" not included?
3. What facts may be taken into consideration in determining whether advertising is false or not?
4. What exemption is made in relation to the medical profession?

Statute

MISCELLANEOUS PROVISIONS OF SECTIONS 56, 57, 58

Sec. 56. Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 or under subsection (1) of section 45, it shall certify the facts to the Attorney General whose duty it shall be to cause appropriate proceedings to be

brought for the enforcement of the provisions of such section or subsection.

Sec. 57. If any provision of this Act, or the application thereof to any person, partnership, corporation, or circumstance, is held invalid, the remainder of the Act and the application of such provision to any other person, partnership, corporation, or circumstance, shall not be affected thereby.

Sec. 58. This Act may be cited as the "Federal Trade Commission Act." 15 U.S.C.A. §§ 56-58.

Sections 56, 57, and 58

Section 56 makes it the duty of the Attorney General to institute proper proceedings when the Federal Trade Commission has certified to the proper facts.

Section 57 is the customary statutory provision that if any portion of the statute is invalid the remainder may continue operative.

Section 58 provides that the Act may be cited as the "Federal Trade Commission Act."

CHAPTER 3

IMPORTATION AND EXPORTATION OF NARCOTIC DRUGS

Importation of Narcotic Drugs

This statute was passed to prohibit the importation or exportation of narcotic drugs. The act declares that the term "narcotic drug" means opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine. The original statute provided for a Federal Narcotics Control Board composed of the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce. In June, 1930, Congress abolished this Board and provided that "There shall be in the Department of the Treasury a bureau to be known as the Bureau of Narcotics and a Commissioner of Narcotics who shall be at the head thereof." By the act the unexplained possession of a narcotic drug raises a presumption of unlawful importation warranting conviction.

Narcotic Drugs—Definitions

Statute: When used in sections 172 to 185 of this title—

(a) The term "narcotic drug" means opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine;

(b) The term "United States," when used in a geographical sense, includes the several States and Territories, and the District of Columbia;

(c) The term "board" means the Federal Narcotics Control Board established by section 172 of this title; and

(d) The term "person" means individual, partnership, corporation, or association. 21 USCA § 171.

New Federal Narcotic Board

The Federal Narcotic Board referred to in subdivision (c) of the section above was abolished by section 282b of title 5, which transferred to the Commissioner of Narcotics all authority, powers, and functions formerly exercised by the Federal Narcotic Control Board.

**Importation of Narcotic Drugs Prohibited—Exceptions—
Crude Opium for Manufacture of Heroin—
Forfeitures**

Statute: It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. 21 USCA § 173.

Importation of Coca Leaves—Additional Quantity Authorized—Destruction of Cocaine and Ecgonine Obtained Therefrom—Duties on Imported Coca Leaves

Statute: In addition to the amount of coca leaves which may be imported under the first paragraph of section 173 of this title, the Commissioner of Narcotics is authorized to permit, in accordance with regulations issued by him, the importation of additional amounts of coca leaves: Provided, That after the entry thereof into the United States all cocaine, ecgonine, and all salts, derivatives, and preparations from which cocaine or ecgo-

nine may be synthesized or made, contained in such additional amounts of coca leaves, shall be destroyed under the supervision of an authorized representative of the Commissioner of Narcotics. All coca leaves imported under this section shall be subject to the duties which are now or may hereafter be imposed upon such coca leaves when imported. 21 USCA § 173a.

Penalty—Evidence

Statute: If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than \$5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. 21 USCA § 174.

Unlawful Importation of Narcotic Drugs

Digest of Cases:

1. Statute is Constitutional. An objection that the statute is unconstitutional is too frivolous to serve as a foundation for writ of error. *Brolan v. U. S.* (1915) 236 U. S. 216, 35 S. Ct. 285, 59 L. Ed. 544.

2. This statute is a valid exercise of the power to regulate foreign commerce. *Steinfeldt v. U. S.* (1915) 219 F. 879, 135 C. C. A. 549.

3. The statute declaring the possession of opium shall make out a prima facie case, and that smoking opium shall be presumed to have been imported in violation of law, is not unconstitutional. *Ng Choy Fong v. U. S.* (1917) 245 F. 305, 157 C. C. A. 497.

4. The concealment or sale of opium of any kind, whether smoking opium or not, knowing it to have been imported contrary to law, constitutes an offense under the statute. *Iponmatsu Ukichi v. U. S.* (C. C. A. 1922) 281 F. 525.

5. The offense of importing opium is committed when smoking opium is brought within the territorial limits of the United States, though it is not landed from the ship or carried across the custom's lines. *U. S. v. Caminata* (D. C. 1912) 194 F. 903.

6. The court takes judicial notice that opium is not commercially a domestic product. *U. S. v. Yee Fing* (D. C. 1915) 222 F. 154.

7. Unexplained possession of morphine raises presumption of unlawful importation warranting conviction. *Morlen v. U. S.* (C. C. A. 1926) 13 F.(2d) 625.

8. Concealment and sale of narcotic drugs constitute distinct offenses, notwithstanding both occur in connection with a single transaction. *Parmagini v. U. S.* (C. C. A. 1930) 42 F.(2d) 721.

9. The act does not conflict with the police powers of the states. *Shepard v. U. S.* (C. C. A. 1916) 236 F. 73.

10. The act does not deny due process of law. *U. S. v. Yee Fing* (D. C. 1915) 222 F. 154.

Deportation of Convicted Aliens

Statute: Any alien who at any time after his entry is convicted under section 170 of this title shall upon the termination of the imprisonment imposed by the court upon such conviction and upon warrant issued by the Secretary of Labor be taken into custody and deported in accordance with the provisions of sections 155 and 156 of Title 8 or provisions of law hereafter enacted which are amendatory of or in substitution for such sections. 21 USCA § 175.

Deportation—Wife and Children American Citizens

Digest of Case:

Court could not consider plea in habeas corpus proceedings that deportation of alien for selling narcotics would work hardship on alien's wife and children alleged to be American citizens. *Todaro v. Munster* (1933) 289 U. S. 738, 53 S. Ct. 657, 77 L. Ed. 1485. See, also, *Id.* (C. C. A.) 62 F.(2d) 963.

Sections 176, 177, 178, and 179 Omitted

These sections are not included here, as they refer to masters of vessels, persons in charge of a railroad car or other vehicle, and persons having possession of narcotic drugs in transport.

Smoking Opium Not Admitted for Transportation to Another Country nor Transferred from One Vessel to Another—Other Narcotic Drugs

Statute: No smoking opium or opium prepared for smoking shall be admitted into the United States or into any territory under its control or jurisdiction for transportation to another country, or be transferred or transshipped from one vessel to another vessel within any waters of the United States for immediate exportation or for any other purpose; and except with the approval of the board, no other narcotic drug may be so admitted, transferred, or transshipped. 21 USCA § 180. (The word "board" in this section now refers to the Commissioner of Narcotics.)

Presumption and Burden of Proof as to Importation of Smoking Opium

Statute: All smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported contrary to law, and the burden of proof shall be on the claimant or the accused to rebut such presumption. 21 USCA § 181.

Exportation of Narcotic Drugs Prohibited—Rules and Regulations by Board

Statute: (a) It shall be unlawful for any person subject to the jurisdiction of the United States Government to export or cause to be exported from the United States, or from territory under its control or jurisdiction, or from countries in which the United States exercises extraterritorial jurisdiction, any narcotic drug to any other country. Narcotic drugs (except smoking opium and opium prepared for smoking, the exportation of which is absolutely prohibited) may be exported to a country only which has ratified and become a party to the convention and final protocol between the United States Government and other powers for the suppression of the abuses of opium and other drugs, commonly known as the International Opium Convention of 1912, and then only if (1) such country has instituted and maintains, in conformity with that convention, a system, which the board deems adequate, of permits or licenses for the control of imports of such narcotic drugs: (2) the narcotic drug

is consigned to an authorized permittee; and (3) there is furnished to the board proof deemed adequate by it, that the narcotic drug is to be applied exclusively to medical and legitimate uses within the country to which exported, that it will not be reexported from such country and that there is an actual shortage of and a demand for the narcotic drug for medical and legitimate uses within such country.

(b) The Secretary of State shall request all foreign governments to communicate through the diplomatic channels copies of the laws and regulations promulgated in their respective countries which prohibit or regulate the importation and shipment in transit of any narcotic drug and, when received, advise the board thereof.

(c) The board shall make and publish all proper regulations to carry into effect the authority vested in it by this subchapter. 21 USCA § 182. (The word "Board" now refers to the Commissioner of Narcotics.)

Punishment—Share of Fine to Informer

Statute: Any person who exports or causes to be exported any narcotic drugs in violation of the preceding section shall be fined in any sum not exceeding \$5,000 nor less than \$50 or by imprisonment for any time not exceeding two years, or both. And one-half of any fine recovered from any person or persons convicted of an offense under any section of this subchapter may be paid to the person or persons giving information leading to such recovery, and one-half of any bail forfeited and collected in any proceedings brought thereunder may be paid to the person or persons giving the information which led to the institution of such proceedings, if so directed by the court exercising jurisdiction in the case. No payment for giving information shall be made to any officer or employee of the United States. 21 USCA § 183.

Section 184 Omitted

This section is not given here, as it refers to narcotic drugs found on vessels or which have been illegally landed.

**OPIUM IMPORTATION BY CHINESE PROHIBITED
—IMPORTATION, TRANSPORTATION, AND
TRAFFICKING IN, IN CHINA, BY CITI-
ZENS OF THE UNITED STATES
PROHIBITED**

Opium Importation by Chinese Prohibited—Penalty

Statute: The importation of opium into any of the ports of the United States by any subject of the Emperor of China is prohibited.

Every person guilty of a violation of the preceding provision shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than \$500 nor less than \$50, or by imprisonment for a period of not more than six months nor less than thirty days, or by both such fine and imprisonment, in the discretion of the court. 21 USCA § 191.

Forfeiture

Statute: Every package containing opium, either in whole or in part, imported into the United States by any subject of the Emperor of China, shall be deemed forfeited to the United States; and proceedings for the declaration and consequences of such forfeiture may be instituted in the courts of the United States as in other cases of the violation of the laws relating to other illegal importations. 21 USCA § 192.

**Importation, Transportation, and Trafficking in, in China,
by Citizens Prohibited**

Statute: No citizen of the United States shall import opium into any of the open ports of China, nor transport the same from one open port to any other open port, or buy or sell opium in any of such open ports of China, nor shall any vessel owned by citizens of the United States, or any vessel, whether foreign or otherwise, employed by any citizen of the United States, or owned by any citizen of the United States, either in whole or in part, and employed by persons not citizens of the United States, take or carry opium into any of such open ports of China, or transport the same from one open port to any other open port, or be engaged in any traffic therein between or in such open ports or

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any of them. Citizens of the United States offending against the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding \$500 nor less than \$50, or by both such punishments, in the discretion of the court. The consular courts of the United States in China, concurrently with any district court of the United States in the district in which any offender may be found, shall have jurisdiction to hear, try, and determine all cases arising under the foregoing provisions of this section, subject to the general regulations provided by law. Every package of opium or package containing opium, either in whole or in part, brought, taken, or transported, trafficked, or dealt in contrary to the provisions of this section, shall be forfeited to the United States, for the benefit of China; and such forfeiture, and the declaration and consequences thereof, shall be made, had, determined, and executed by the proper authorities of the United States exercising judicial powers within China. 21 USCA § 193.

CHAPTER 4

INSECTICIDE ACT

Federal Insecticide Act

In 1910, Congress passed the Insecticide Act, which made it a criminal offense to introduce into one state from another state insecticides which according to the terms of the statute were deemed adulterated or misbranded. It is no defense that the accused did not intend to violate the statute and that he had been using the label years before the statute was passed by Congress. When words have a common everyday meaning, they will be so interpreted when used on a label, unless there is something which clearly gives a different interpretation to them. Generally speaking, then, goods are misbranded if the label bears any statement which will deceive or mislead purchasers who are of normal capacity and who exercise reasonable care in buying such articles.

Definitions Generally — "Insecticide" — "Paris Green" — "Lead Arsenate"—"Fungicide"

Statute: The term "insecticide" as used in this chapter shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any insects which may infest vegetation, man or other animals, or households or be present in any environment whatsoever. The term "Paris green" as used in this chapter shall include the product sold in commerce as Paris green and chemically known as the aceto-arsenite of copper. The term "lead arsenate" as used in this chapter shall include the product or products sold in commerce as lead arsenate and consisting chemically of products derived from arsenic acid by replacing one or more hydrogen atoms by lead. The term "fungicide" as used in this chapter shall include any substance or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all fungi that may infest vegetation or be present in any environment whatsoever. 7 USCA § 122.

Words on Labels have Ordinary Meaning

Digest of Case:

Where words in everyday use are put upon labels, they are to be given their ordinary and customary meaning so far as they have one, unless it is disclosed that their use was under such circumstances that they conveyed a different meaning. *Parke, Davis & Co. v. U. S.* (C. C. A. 1919) 255 F. 933.

Sections 123 and 124 Omitted

These sections are omitted, as section 123 defines the terms "territory and persons," and section 124 states the liability of principal for acts of his agent.

Manufacture of Adulterated or Misbranded Articles Prohibited—Punishment

Statute: It shall be unlawful for any person to manufacture within any Territory or the District of Columbia any insecticide, Paris green, lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this chapter; and any person who shall violate any of the provisions of this section shall be guilty of a misdemeanor, and shall, upon conviction thereof, be fined not to exceed \$200 for the first offense, and upon conviction for each subsequent offense be fined not to exceed \$300, or sentenced to imprisonment, for one year, or both such fine and imprisonment, in the discretion of the court. 7 USCA § 125.

Review of section 125:

1. Why did Congress make special provision for the District of Columbia?
2. What is a misdemeanor?
3. What fines may be imposed?
4. What acts are prohibited by this section?

Transportation or Sale of Adulterated or Misbranded Articles

Statute: The introduction into any State or Territory or the District of Columbia from any other State or Territory or the District of Columbia, or from any foreign country, or ship-

ment to any foreign country, of any insecticide, or Paris green, or lead arsenate, or fungicide which is adulterated or misbranded within the meaning of this chapter is hereby prohibited; and any person who shall ship or deliver for shipment from any State or Territory or the District of Columbia to any other State or Territory or the District of Columbia, or foreign country, and having so received, shall deliver, in original unbroken packages for pay or otherwise, or offer to deliver, to any other person, any such article so adulterated or misbranded within the meaning of this chapter, or any person who shall sell or offer for sale in the District of Columbia or any Territory of the United States any such adulterated or misbranded insecticide, or Paris green, or lead arsenate, or fungicide, or export or offer to export the same to any foreign country, shall be guilty of a misdemeanor, and for such offense be fined not exceeding \$200 for the first offense, and upon conviction for each subsequent offense not exceeding \$300, or be imprisoned not exceeding one year, or both, in the discretion of the court: Provided, That no article shall be deemed misbranded or adulterated within the provisions of this chapter when intended for export to any foreign country and prepared or packed according to the specifications or directions of the foreign purchaser; but if said articles shall be in fact sold or offered for sale for domestic use or consumption, then this proviso shall not exempt said article from the operation of any of the other provisions of this chapter. 7 USCA § 126.

Review of section 126:

1. What acts are prohibited by this section?
2. Why is the transportation prohibited?
3. Why are the offenses based on shipping, delivery for shipment, or receiving adulterated or misbranded insecticide?
4. What exception is made in relation to articles for export to any foreign country?
5. Why is this exception made?

Sections 127, 128, and 129 Omitted

These sections are omitted, as they refer to the collection and examination of specimens and prosecutions by the district attorney of violations.

Goods Delivered in State of Shipment

Digest of Case:

This section was not violated by shipping and delivering a certain insecticide for shipment from a point in New York to another point in the same state by railroad passing through other states en route to the destination, since "introduction" means the bringing into a state of the prohibited article in such a way that it might become a part of the property in such state, and the mere passing of goods through the state en route to destination does not make them part of the property of such states. *U. S. v. Powers-Weightman-Rosengarten Co.* (D. C. 1913) 211 F. 169.

When Articles are Deemed Adulterated

Statute: For the purpose of this chapter an article shall be deemed to be adulterated—

Paris green. In the case of Paris green: First, if it does not contain at least 50% of arsenious oxide; second, if it contains arsenic in water-soluble forms equivalent to more than $3\frac{1}{2}$ per centum of arsenious oxide; third, if any substance has been mixed and packed with it so as to reduce or lower or injuriously affect its quality or strength.

Lead arsenate. In the case of lead arsenate: First, if it contains more than 50 per centum of water; second, if it contains total arsenic equivalent to less than $12\frac{1}{2}$ per centum or arsenic oxid; third, if it contains arsenic in water-soluble forms equivalent to more than 0.75 per centum of arsenic oxid; fourth, if any substances have been mixed and packed with it so as to reduce, lower, or injuriously affect its quality or strength: Provided, however, That extra water may be added to lead arsenate (as described in this paragraph) if the resulting mixture is labeled lead arsenate and water, the percentage of extra water being plainly and correctly stated on the label.

Other insecticides or fungicides. In the case of insecticides or fungicides, other than Paris green and lead arsenate: First, if its strength or purity fall below the professed standard or quality under which it is sold; second, if any substance has been substituted wholly or in part for the article; third, if any valuable constituent of the article has been wholly or in part abstracted; fourth, if it is intended for use on vegetation and shall contain any substance or substances which, although prevent-

ing, destroying, repelling or mitigating insects, shall be injurious to such vegetation when used. 7 USCA § 130.

Label Stated that Water had been Added

Digest of Case:

An insecticide or fungicide as "Kil-Tone" was not adulterated or misbranded by reason of addition of water to the net weight to take care of evaporation, though it increased the volume of the contents of the package, and may have caused the proportion of the active ingredients to appear less than called for by the labels; it being stated on the label that water was added "in addition to the net weight." U. S. v. 323 Packages of Kil-Tone (C. C. A. 1922) 279 F. 398, 399.

When Articles Deemed "Misbranded"—Labels

Statute: The term "misbranded" as used in this chapter shall apply to all insecticides, Paris greens, lead arsenates, or fungicides, or articles which enter into the composition of insecticides or fungicides, the package or label of which shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading in any particular, and to all insecticides, Paris greens, lead arsenates, or fungicides which are falsely branded as to the State, Territory, or country in which they are manufactured or produced.

For the purpose of this chapter an article shall be deemed to be misbranded—In the case of insecticides, Paris greens, lead arsenates, and fungicides: First, if it be an imitation or offered for sale under the name of another article; second, if it be labeled or branded so as to deceive or mislead the purchaser, or if the contents of the package as originally put up shall have been removed in whole or in part and other contents shall have been placed in such package; third, if in package form, and the contents are stated in terms of weight or measure, they are not plainly and correctly stated on the outside of the package.

Insecticides (other than Paris greens and lead arsenates) and fungicides; statements on labels. In the case of insecticides (other than Paris greens and lead arsenates) and fungicides: First, if it contains arsenic in any of its combinations or in the elemental form and the total amount of arsenic present (expressed as per centum of metallic arsenic) is not stated on the label;

second, if it contains arsenic in any of its combinations or in the elemental form and the amount of arsenic in water-soluble forms (expressed as per centum of metallic arsenic) is not stated on the label; third, if it consists partially or completely of an inert substance or substances which do not prevent, destroy, repel, or mitigate insects or fungi and does not have the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label: Provided, however, That in lieu of naming and stating the percentage amount of each and every inert ingredient the producer may at his discretion state plainly upon the label the correct names and percentage amounts of each and every ingredient of the insecticide or fungicide having insecticidal or fungicidal properties, and make no mention of the inert ingredients, except in so far as to state the total percentage of inert ingredients present. 7 USCA § 131:

Construction of "Misbranded"

Digest of Cases:

1. Goods are misbranded if they bear any statement which will deceive or mislead purchasers who are of normal capacity and who use that capacity in a common sense way. U. S. v. Two Cases of Chloro-Naphtholeum Disinfectant (D. C. 1914) 217 F. 477.

2. It is no defense that a name, deceptive in itself, deceives only a few purchasers. U. S. v. Two Cases of Chloro-Naphtholeum Disinfectant (D. C. 1914) 217 F. 477.

Guaranty of Wholesaler—Protection to Retailer—Liability of Guarantor

Statute: No dealer shall be prosecuted under the provisions of this chapter when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchased such articles, to the effect that the same is not adulterated or misbranded within the meaning of this chapter, designating it. Said guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such articles to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach in due course to the dealer under the provisions of this chapter. 7 USCA § 132.

Review of section 132:

1. Under this section, how may a dealer protect himself?
2. Who may give a guaranty?
3. What facts should be stated in the guaranty?

The Federal Insecticide Act Construed

Case:

UNITED STATES v. TWO CASES OF CHLORO-NAPHTHOLEUM DISINFECTANT.

District Court of the United States, 1914. 217 F. 477.

Libel by the United States against two cases of Chloro-Naphtholeum Disinfectant.

The case arises out of a seizure under the tenth section of the Insecticide Act. The packages proceeded against were labeled "Chloro-Naphtholeum." The libel says that such label constituted a misbranding. It charges that the words used conveyed, and were intended to convey, the meaning and impression that the article contained as an essential ingredient chlorine or chloronaphthol. Claimant admits that it did not.

- Questions:*
- (1) Is it a defense that the shipper did not intend to violate the statute?
 - (2) What meaning will be given to common words put on labels?
 - (3) Is an article misbranded if it be labeled so as to deceive or mislead the purchaser?

ROSE, District Judge. The allegation that the words were intended to convey a false meaning is immaterial. Absence of fraudulent intent on the part of the shipper is not a defense to proceedings under the Food and Drugs or Insecticide Acts.

In substance the jury were instructed that a word does not become purely arbitrary until it has lost its descriptive significance both to the specialist in the subject and to the general public. In this circuit it has already been determined that, where words in everyday use are put upon labels, they will be held to have been used in their popular meaning rather than that which they have acquired among manufacturers and dealers. *Libby, McNeill & Libby v. United States*, 210 F. 148, 127 C. C. A. 14.

In the case at bar the words in controversy were not in everyday use. Only a few people accurately knew their meaning.

Nevertheless they had a definite and precise one. That is now what it was at and before claimant's predecessors by accident or design adopted the phrase, or what appears to be an obvious variant thereof, as the name of their product. Moreover the very thing to which it properly belonged could be used, and in some respects at least was well adapted for use, for the very purposes for which claimant's goods were offered for sale. Claimant says, conceding all this, its wares have by that name been on the market for about 30 years. Those who know of the words only in connection with its product are at least 100 times as numerous as those who ever knew what their real meaning was and is.

The Insecticide Act was not passed until nearly four years after the Food and Drugs Act had gone upon the statute book. Various questions under the former had been raised before the latter was enacted. A comparison of the text of the two shows that the draftsman of the Insecticide Act took the Food and Drugs Act as his model. The larger part of it he copied verbatim. Where he did not it was obviously because he had a definite purpose in departing from it. *United States v. Thirty Dozen Packages of Roach Food* (D. C.) 202 F. 271. A word here or there might have been left out or altered as the result of a clerical mistake. Changes of another sort are clearly significant. The first proviso of the eighth section of the Food and Drugs Act is not to be found in the Insecticide Act, nor is there any substitute for it. Its exclusion could not have been accidental. It must have been intended. Congress clearly did not wish the administration and enforcement of the younger act to be embarrassed by any of the controversies of which the proviso in the older had been so fruitful a mother.

Claimant says that it has given the words it uses the only meaning they have to the purchasing public; that no matter what they once meant, no matter what they now mean to chemists and learned men, they mean its goods and nothing else to the people. It says that the purchasers know that the name is not descriptive. Is that true? Most of those who buy it or use it may not know what its name describes. It does not necessarily follow that they know it is not intended to describe anything. They or many of them may very naturally suppose that it does describe something, although what that something is they may not know accurately or at all. Once in a while some of them may become curious, and may ask some one who is more or less well posted on chemical subjects. He tells them what the words

imply as to the composition of the article. Thereafter the label misleads and deceives them, if it did not before.

The claimant contends that it violates no law because that which deceives the best informed does not deceive the ignorant, and because on this particular subject the ignorant are in a great majority. As a matter of fact it is utterly impossible for any court or for any jury to tell how much of the knowledge that the few have disseminates itself through the mass of the population in a more or less inaccurate guise. Chlorine has recently been extensively used by municipalities and other public bodies as a germicide. Its properties have thus been brought to public attention. The world is now reading much about the transmission of disease by bacteria, microbes, and insects. More and more people are becoming interested in the chemicals which are useful in destroying them. Among these naphthols are included.

The act says an insecticide is misbranded if it bears any statement, design, or device regarding such article or the ingredients or substances contained therein which is false or misleading in any particular. The undisputed evidence in this case is that if the words "Chloro-Naphtholeum" are to be understood in the sense they have to those people to whom they have any meaning at all, they are false and misleading. The act goes on to say that for its purposes an insecticide shall be deemed to be misbranded if, among other things, it be labeled or branded so as to deceive the purchaser.

Claimant assumes, however, that it has the right to deceive some purchasers provided it does not deceive many. The language of the act does not suggest such an interpretation. If it did, some curious results would follow. Take the case of an article which has commanded a large sale. Nevertheless some persons would not buy it. They had an idea that it contained a particular constituent which they regarded as dangerous. There were not many people who thought so. The great body of the consumers never even so much as heard of the thing which the small minority dreaded. The majority never gave a thought or care as to whether it was or was not present. The manufacturer of the goods adds to his label the statement that it does not contain this particular ingredient. If the statement is untrue in fact, there can be no question that the goods are misbranded. It will be immaterial that 9 out of 10 or 99 out of 100 of those who buy the article pay no attention whatever to it and are not in the slightest degree interested as to whether it is or is not accurate. Goods are misbranded if they bear any statement

which will deceive or mislead any purchasers who are of normal capacity and who use that capacity in a common sense way. Whether there be many or few so deceived is not material. Whether an article is or is not misbranded does not depend upon the guess court or jury can make as to the relative number of purchasers who would vote "yes" or "no" if a referendum were possible as to whether they had or had not been deceived.

Claimant points out that for many years it has sold large quantities of its product under this particular name. It has done no harm to anybody. It asks why it should be compelled to incur all the trouble and expense of familiarizing the purchasing public with a new name for the old thing. There is no doubt that to do so will be both costly and inconvenient. Nevertheless it must be borne in mind that in the long run the honest manufacturer, as claimant doubtless is, is the one principally interested in the strict, and in even the rigid, enforcement of laws of this character. The more candid all his competitors are required to be, the better for him. Standards impossible of unvarying application will work to his injury. He cannot afford to say anything about his goods which is not in every reasonable sense, and from the standpoint of every well-informed person, true. If he is a law-abiding man, he does not want to take the chance of doing something which may be held to be illegal. He is always likely to have competitors who are perfectly willing to. The motion for a new trial is denied.

Readings: Federal Insecticide Act. The Insecticide Act copied after Food and Drugs Act. U. S. v. Thirty Dozen Packages of Roach Food (D. C. 1913) 202 F. 271, 273.

CHAPTER 5

POSTAL REGULATIONS

Mails—Exclusion of Matter from

Congress has power to designate what articles may be carried by the mails, and it may also designate what articles are unmailable. This section of the Criminal Code is clear in excluding printed matter which is "obscene, lewd, or lascivious, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use." It is a violation of this act to mail any advertisement or notice giving information where or from whom such articles may be obtained, and it is no defense that the information was given in response to a decoy letter sent by a government inspector.

Postal Regulations—Mailing Obscene Matter

Statute: Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore-mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and every letter, packet, or package, or other mail matter containing any filthy, vile, or indecent thing, device, or substance; and every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or

can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and every description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing, is hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable, or shall knowingly take, or cause the same to be taken, from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than \$5,000, or imprisoned not more than five years, or both. The term "indecent" within the intendment of this section shall include matter of a character tending to incite arson, murder, or assassination. U. S. Criminal Code § 211, amended.

Dunning Postal Cards—Not Mailable

Section 212 of the Federal Criminal Code prohibits the mailing of a postal card, envelope, or wrapper, the outside of which contains language of a "threatening character" or language "calculated * * * and obviously intended to reflect injuriously upon the character or conduct" of the person to whom it is addressed. Under the provisions of this statute, a card demanding payment of a debt, and stating that "if it is not paid at once we shall place the same with our lawyer for collection," was held to be nonmailable matter. U. S. v. Bayle (D. C.) 40 F. 664, 6 L. R. A. 742.

Depositing Circulars, Sale Bills, etc., in Letter Boxes Prohibited

Statute: Whoever shall knowingly or willfully deposit any mailable matter such as statements of accounts, circulars, sale bills, or other like matter, on which no postage has been paid, in any letter box established, approved, or accepted by the Postmaster General for the receipt or delivery of mail matter on any mail route with intent to avoid payment of lawful postage thereon; or shall willfully aid or assist in any of the aforesaid offenses, shall for every such offense be punished by a fine of not more than \$300. Act of May 7, 1934.

**Poisons or Explosives Not Mailable—Packing Permitted—
Intoxicating Liquors**

Statute: All kinds of poison, and all articles and compositions containing poison, and all poisonous animals, insects, and reptiles, and explosives of all kinds, and inflammable materials, and infernal machines, and mechanical, chemical, or other devices or compositions which may ignite or explode, and all disease germs or scabs, and all other natural or artificial articles, compositions, or material, of whatever kind, which may kill or in anywise hurt, harm, or injure another, or damage, deface, or otherwise injure the mails or other property, whether sealed as first-class matter or not, are hereby declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or station thereof, nor by any letter carrier; but the Postmaster General may permit the transmission in the mails, under such rules and regulations as he shall prescribe as to preparation and packing, of any articles hereinbefore described which are not outwardly or of their own force dangerous or injurious to life, health, or property: Provided, That the transmission in the mails of poisonous drugs and medicines may be limited by the Postmaster General to shipments of such articles from the manufacturer thereof or dealer therein to licensed physicians, surgeons, dentists, pharmacists, druggists, and veterinarians, under such rules and regulations as he shall prescribe: Provided further, That all spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind are hereby declared to be nonmailable and shall not be deposited in or carried through the mails. [Penalties omitted.] 18 USCA § 340. . .

Readings: Objectionable Matter Excluded from United States Mails.

1. Freedom of the Press Not Violated. *Knowles v. United States* (C. C. A. 1909) 170 F. 409, 95 C. C. A. 579.
2. Forbids Depositing Nonmailable Matter in United States Mails. *Coomer v. U. S.* (1914) 213 F. 1, 129 C. C. A. 617.
3. Mailing Information to Promote Abortion. *Kemp v. Board of Medical Supervisors* (1917) 46 App. D. C. 173.
4. Correspondence Concerning Abortion. *Kemp v. U. S.* (1914) 41 App. D. C. 539, 51 L. R. A. (N. S.) 825.

5. Pamphlet on Venereal Disease. U. S. v. Chesman (C. C.) 19 F. 497.
6. Pamphlet on Private Diseases. U. S. v. Smith (D. C.) 45 F. 476.
7. Letter Containing Objectionable Matter. Grimm v. U. S., 156 U. S. 604, 15 S. Ct. 470, 39 L. Ed. 550.
8. To Prevent Conception. Ackley v. U. S., 200 F. 217, 118 C. C. A. 403.

APPENDIX 1

UNIFORM NARCOTIC DRUG ACT

AN ACT DEFINING AND RELATING TO NARCOTIC DRUGS AND TO MAKE UNIFORM THE LAW WITH REFERENCE THERETO

§ 1. [Definitions.] The following words and phrases, as used in this act, shall have the following meanings, unless the context otherwise requires:

(1) "Person" includes any corporation, association, copartnership, or one or more individuals.

(2) "Physician" means a person authorized by law to practice medicine in this state and any other person authorized by law to treat sick and injured human beings in this state and to use narcotic drugs in connection with such treatment.

(3) "Dentist" means a person authorized by law to practice dentistry in this state.

(4) "Veterinarian" means a person authorized by law to practice veterinary medicine in this state.

(5) "Manufacturer" means a person who by compounding, mixing, cultivating, growing, or other process, produces or prepares narcotic drugs, but does not include an apothecary who compounds narcotic drugs to be sold or dispensed on prescriptions.

(6) "Wholesaler" means a person who supplies narcotic drugs that he himself has not produced nor prepared, on official written orders, but not on prescriptions.

(7) "Apothecary" means a licensed pharmacist as defined by the laws of this state and, where the context so requires, the owner of a store or other place of business where narcotic drugs are compounded or dispensed by a licensed pharmacist; but nothing in this act shall be construed as conferring on a person who is not registered nor licensed as a pharmacist any authority, right, or privilege, that is not granted to him by the pharmacy laws of this state.

(8) "Hospital" means an institution for the care and treatment of the sick and injured, approved by [Insert here proper official designation of state officer or board] as proper to be entrusted with the custody of narcotic drugs and the professional use of narcotic drugs under the direction of a physician, dentist, or veterinarian.

(9) "Laboratory" means a laboratory approved by [Insert here proper official designation of state officer or board] as proper to be entrusted with the custody of narcotic drugs and the use of narcotic drugs for scientific and medical purposes and for purposes of instruction.

(10) "Sale" includes barter, exchange, or gift, or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant, or employee.

(11) "Coca leaves" includes cocaine and any compound, manufacture, salt, derivative, mixture, or preparation of coca leaves, except derivatives of coca leaves which do not contain cocaine, ecgonine, or substances from which cocaine or ecgonine may be synthesized or made.

(12) "Opium" includes morphine, codeine, and heroin, and any compound, manufacture, salt, derivative, mixture, or preparation of opium, but does not include apomorphine or any of its salts.

(13) "Narcotic drugs" means coca leaves and opium and every substance neither chemically nor physically distinguishable from them.

(14) "Federal Narcotic Laws" means the laws of the United States relating to opium, coca leaves, and other narcotic drugs.

(15) "Official written order" means an order written on a form provided for that purpose by the United States Commissioner of Narcotics, under any laws of the United States making provision therefor, if such order forms are authorized and required by federal law, and if no such order form is provided, then on an official form provided for that purpose by [Insert here proper official designation of state officer or board].

(16) "Dispense" includes distribute, leave with, give away, dispose of, or deliver.

(17) "Registry number" means the number assigned to each person registered under the Federal Narcotic Laws.

§ 2. [Acts Prohibited.] It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense, or compound any narcotic drug, except as authorized in this act.

§ 3. [Manufacturers and Wholesalers.] No person shall manufacture, compound, mix, cultivate, grow, or by any other process produce or prepare narcotic drugs, and no person as a wholesaler shall supply the same, without having first obtained a license so to do from the [Insert here proper official designation of state officer or board.]

§ 4. [Qualification for Licenses.] No license shall be issued under the foregoing section unless and until the applicant therefor has furnished proof satisfactory to [Insert here proper official designation of state officer or board.]

(a) That the applicant is of good moral character or, if the applicant be an association or corporation, that the managing officers are of good moral character.

(b) That the applicant is equipped as to land, buildings, and paraphernalia properly to carry on the business described in his application.

No license shall be granted to any person who has within five years been convicted of a willful violation of any law of the United States, or of any state, relating to opium, coca leaves, or other narcotic drugs, or to any person who is a narcotic drug addict.

The [Insert here proper official designation of state officer or board] may suspend or revoke any license for cause.

§ 5. [Sale on Written Orders.] (1) A duly licensed manufacturer or wholesaler may sell and dispense narcotic drugs to any of the following persons, but only on official written orders:

(a) To a manufacturer, wholesaler, or apothecary.

(b) To a physician, dentist, or veterinarian.

(c) To a person in charge of a hospital, but only for use by or in that hospital.

(d) To a person in charge of a laboratory, but only for use in that laboratory for scientific and medical purposes.

(2) A duly licensed manufacturer or wholesaler may sell narcotic drugs to any of the following persons:

(a) On a special written order accompanied by a certificate of exemption, as required by the Federal Narcotic Laws, to a person in the employ of the United States Government or of any state, territorial, district, county, municipal, or insular government, purchasing, receiving, possessing, or dispensing narcotic drugs by reason of his official duties.

(b) To a master of a ship or a person in charge of any aircraft upon which no physician is regularly employed, for the actual medical needs of persons on board such ship or aircraft, when not in port. Provided: Such narcotic drugs shall be sold to the master of such ship or person in charge of such aircraft only in pursuance of a special order form approved by a commissioned medical officer or acting assistant surgeon of the United States Public Health Service.

(c) To a person in a foreign country if the provisions of the Federal Narcotic Laws are complied with.

(3) [*Use of Official Written Orders.*] An official written order for any narcotic drug shall be signed in duplicate by the person giving said order or by his duly authorized agent. The original shall be presented to the person who sells or dispenses the narcotic drug or drugs named therein. In event of the acceptance of such order by said person, each party to the transaction shall preserve his copy of such order for a period of two years in such a way as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this act. It shall be deemed a compliance with this subsection if the parties to the transaction have complied with the Federal Narcotic Laws, respecting the requirements governing the use of order forms.

(4) [*Possession Lawful.*] Possession of or control of narcotic drugs obtained as authorized by this section shall be lawful if in the regular course of business, occupation, profession, employment, or duty of the possessor.

(5) A person in charge of a hospital or of a laboratory, or in the employ of this state or of any other state, or of any political subdivision thereof, and a master or other proper officer of a ship or aircraft, who obtains narcotic drugs under the provisions of this section or otherwise, shall not administer, nor dispense, nor otherwise use such drugs, within this state, except within the scope of his employment or official duty, and then only for scientific or medicinal purposes and subject to the provisions of this act.

§ 6. [*Sales by Apothecaries.*] (1) An apothecary, in good faith, may sell and dispense narcotic drugs to any person upon a written prescription of a physician, dentist, or veterinarian, dated and signed by the person prescribing on the day when issued and bearing the full name and address of the patient for whom, or of the owner of the animal for which, the drug is dispensed, and the full name, address, and registry number under

the Federal Narcotic Laws of the person prescribing, if he is required by those laws to be so registered. If the prescription be for an animal, it shall state the species of animal for which the drug is prescribed. The person filling the prescription shall write the date of filling and his own signature on the face of the prescription. The prescription shall be retained on file by the proprietor of the pharmacy in which it is filled for a period of two years, so as to be readily accessible for inspection by any public officer or employee engaged in the enforcement of this act. The prescription shall not be refilled.

(2) The legal owner of any stock of narcotic drugs in a pharmacy, upon discontinuance of dealing in said drugs, may sell said stock to a manufacturer, wholesaler, or apothecary, but only on an official written order.

(3) An apothecary, only upon an official written order, may sell to a physician, dentist, or veterinarian, in quantities not exceeding one ounce at any one time, aqueous or oleaginous solutions of which the content of narcotic drugs does not exceed a proportion greater than twenty percent of the complete solution, to be used for medical purposes.

§ 7. [Professional Use of Narcotic Drugs.] (1) [*Physicians and Dentists.*] A physician or a dentist, in good faith and in the course of his professional practice only, may prescribe, administer, and dispense narcotic drugs, or he may cause the same to be administered by a nurse or interne under his direction and supervision.

(2) [*Veterinarians.*] A veterinarian, in good faith and in the course of his professional practice only, and not for use by a human being, may prescribe, administer, and dispense narcotic drugs, and he may cause them to be administered by an assistant or orderly under his direction and supervision.

(3) [*Return of Unused Drugs.*] Any person who has obtained from a physician, dentist, or veterinarian any narcotic drug for administration to a patient during the absence of such physician, dentist, or veterinarian, shall return to such physician, dentist, or veterinarian any unused portion of such drug, when it is no longer required by the patient.

§ 8. [Preparations Exempted.] Except as otherwise in this act specifically provided, this act shall not apply to the following cases:

(1) Prescribing, administering, dispensing, or selling at retail of any medicinal preparation that contains in one fluid ounce,

or if a solid or semi-solid preparation, in one avoirdupois ounce, (a) not more than two grains of opium, (b) not more than one-quarter of a grain of morphine or of any of its salts, (c) not more than one grain of codeine or of any of its salts, (d) not more than one-eighth of a grain of heroin or of any of its salts, (e) and not more than one of the drugs named above in clauses (a), (b), (c), and (d).

(2) Prescribing, administering, dispensing, or selling at retail of liniments, ointments, and other preparations, that are susceptible of external use only and that contain narcotic drugs in such combinations as prevent their being readily extracted from such liniments, ointments, or preparations, except that this act shall apply to all liniments, ointments, and other preparations, that contain coca leaves in any quantity or combination.

The exemptions authorized by this section shall be subject to the following conditions:

(a) No person shall prescribe, administer, dispense, or sell under the exemptions of this section, to any one person, or for the use of any one person or animal, any preparation or preparations included within this section, when he knows, or can by reasonable diligence ascertain, that such prescribing, administering, dispensing, or selling will provide the person to whom or for whose use, or the owner of the animal for the use of which, such preparation is prescribed, administered, dispensed, or sold, within any forty-eight consecutive hours, with more than four grains of opium, or more than one-half grain of morphine or of any of its salts, or more than two grains of codeine or of any of its salts, or more than one-quarter of a grain of heroin or of any of its salts, or will provide such person or the owner of such animal, within 48 consecutive hours, with more than one preparation exempted by this section from the operation of this act.

(b) The medicinal preparation, or the liniment, ointment, or other preparation susceptible of external use only, prescribed, administered, dispensed, or sold, shall contain, in addition to the narcotic drug in it, some drug or drugs conferring upon it medicinal qualities other than those possessed by the narcotic drug alone. Such preparation shall be prescribed, administered, dispensed, and sold in good faith as a medicine, and not for the purpose of evading the provisions of this act.

Nothing in this section shall be construed to limit the kind and quantity of any narcotic drug that may be prescribed, administered, dispensed, or sold, to any person or for the use of any person or animal, when it is prescribed, administered, dispensed, or sold, in compliance with the general provisions of this act.

§ 9. [Record to Be Kept.] (1) [*Physicians, Dentists, Veterinarians, and Other Authorized Persons.*] Every physician, dentist, veterinarian, or other person who is authorized to administer or professionally use narcotic drugs, shall keep a record of such drugs received by him, and a record of all such drugs administered, dispensed, or professionally used by him otherwise than by prescription. It shall, however, be deemed a sufficient compliance with this subsection if any such person using small quantities of solutions or other preparations of such drugs for local application, shall keep a record of the quantity, character, and potency of such solutions or other preparations purchased or made up by him, and of the dates when purchased or made up, without keeping a record of the amount of such solution or other preparation applied by him to individual patients.

Provided: That no record need be kept of narcotic drugs administered, dispensed, or professionally used in the treatment of any one patient, when the amount administered, dispensed, or professionally used for that purpose does not exceed in any forty-eight consecutive hours, (a) four grains of opium, or (b) one-half of a grain of morphine or of any of its salts, or (c) two grains of codeine or of any of its salts, or (d) one-fourth of a grain of heroin or of any of its salts, or (e) a quantity of any other narcotic drug or any combination of narcotic drugs that does not exceed in pharmacologic potency any one of the drugs named above in the quantity stated.

(2) [*Manufacturers and Wholesalers.*] Manufacturers and wholesalers shall keep records of all narcotic drugs compounded, mixed, cultivated, grown, or by any other process produced or prepared, and of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

(3) [*Apothecaries.*] Apothecaries shall keep records of all narcotic drugs received and disposed of by them, in accordance with the provisions of subsection 5 of this section.

(4) [*Vendors of Exempted Preparations.*] Every person who purchases for resale, or who sells narcotic drug preparations exempted by Section 8 of this act, shall keep a record showing the quantities and kinds thereof received and sold, or disposed of otherwise, in accordance with the provisions of subsection 5 of this section.

(5) [*Form and Preservation of Records.*] The form of records shall be prescribed by the [Insert here proper official designation of state officer or board.] The record of narcotic drugs

received shall in every case show the date of receipt, the name and address of the person from whom received, and the kind and quantity of drugs received; the kind and quantity of narcotic drugs produced or removed from process of manufacture, and the date of such production or removal from process of manufacture; and the record shall in every case show the proportion of morphine, cocaine, or ecgonine contained in or producible from crude opium or coca leaves received or produced. The record of all narcotic drugs sold, administered, dispensed, or otherwise disposed of, shall show the date of selling, administering, or dispensing, the name and address of the person to whom, or for whose use, or the owner and species of animal for which the drugs were sold, administered or dispensed, and the kind and quantity of drugs. Every such record shall be kept for a period of two years from the date of the transaction recorded. The keeping of a record required by or under the Federal Narcotic Laws, containing substantially the same information as is specified above, shall constitute compliance with this section, except that every such record shall contain a detailed list of narcotic drugs lost, destroyed, or stolen, if any, the kind and quantity of such drugs, and the date of the discovery of such loss, destruction, or theft.

§ 10. [Labels.] (1) Whenever a manufacturer sells or dispenses a narcotic drug, and whenever a wholesaler sells or dispenses a narcotic drug in a package prepared by him, he shall securely affix to each package in which that drug is contained a label showing in legible English the name and address of the vendor and the quantity, kind, and form of narcotic drug contained therein. No person, except an apothecary for the purpose of filling a prescription under this act, shall alter, deface, or remove any label so affixed.

(2) Whenever an apothecary sells or dispenses any narcotic drug on a prescription issued by a physician, dentist, or veterinarian, he shall affix to the container in which such drug is sold or dispensed, a label showing his own name, address, and registry number, or the name, address, and registry number of the apothecary for whom he is lawfully acting; the name and address of the patient or, if the patient is an animal, the name and address of the owner of the animal and the species of the animal; the name, address, and registry number of the physician, dentist, or veterinarian, by whom the prescription was written; and such directions as may be stated on the prescription. No person shall alter, deface, or remove any label so affixed.

§ 11. [Authorized Possession of Narcotic Drugs by Individuals.] A person to whom or for whose use any narcotic drug has been prescribed, sold, or dispensed, by a physician, dentist, apothecary, or other person authorized under the provisions of Section 5 of this act, and the owner of any animal for which any such drug has been prescribed, sold, or dispensed, by a veterinarian, may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing the same.

§ 12. [Persons and Corporations Exempted.] The provisions of this act restricting the possessing and having control of narcotic drugs shall not apply to common carriers or to warehousemen, while engaged in lawfully transporting or storing such drugs, or to any employee of the same acting within the scope of his employment; or to public officers or their employees in the performance of their official duties requiring possession or control of narcotic drugs; or to temporary incidental possession by employees or agents of persons lawfully entitled to possession, or by persons whose possession is for the purpose of aiding public officers in performing their official duties.

§ 13. [Common Nuisances.] Any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by narcotic drug addicts for the purpose of using narcotic drugs or which is used for the illegal keeping or selling of the same, shall be deemed a common nuisance. No person shall keep or maintain such a common nuisance.

§ 14. [Narcotic Drugs to be Delivered to State Official, Etc.] All narcotic drugs, the lawful possession of which is not established or the title to which cannot be ascertained, which have come into the custody of a peace officer, shall be forfeited, and disposed of as follows:

(a) Except as in this section otherwise provided, the court or magistrate having jurisdiction shall order such narcotic drugs forfeited and destroyed. A record of the place where said drugs were seized, of the kinds and quantities of drugs so destroyed, and of the time, place, and manner of destruction, shall be kept, and a return under oath, reporting said destruction, shall be made to the court or magistrate and to the United States Commissioner of Narcotics, by the officer who destroys them.

(b) Upon written application by the State [Commissioner of Public Health], the court or magistrate by whom the forfeiture of narcotic drugs has been decreed may order the delivery of any of them, except heroin and its salts and derivatives, to said State [Commissioner of Public Health], for distribution or destruction, as hereinafter provided.

(c) Upon application by any hospital within this State, not operated for private gain, the state [Commissioner of Public Health] may in his discretion deliver any narcotic drugs that have come into his custody by authority of this section to the applicant for medicinal use. The State [Commissioner of Public Health] may from time to time deliver excess stocks of such narcotic drugs to the United States Commissioner of Narcotics, or may destroy the same.

(d) The State [Commissioner of Public Health] shall keep a full and complete record of all drugs received and of all drugs disposed of, showing the exact kinds, quantities, and forms of such drugs; the persons from whom received and to whom delivered; by whose authority received, delivered, and destroyed; and the dates of the receipt, disposal, or destruction, which record shall be open to inspection by all Federal or State officers charged with the enforcement of Federal and State narcotic laws.

§ 15. [Notice of Conviction to Be Sent to Licensing Board.] On the conviction of any person of the violation of any provision of this act, a copy of the judgment and sentence, and of the opinion of the court or magistrate, if any opinion be filed, shall be sent by the clerk of the court, or by the magistrate, to the board or officer, if any, by whom the convicted defendant has been licensed or registered to practice his profession or to carry on his business. On the conviction of any such person, the court may, in its discretion, suspend or revoke the license or registration of the convicted defendant to practice his profession or to carry on his business. On the application of any person whose license or registration has been suspended or revoked, and upon proper showing and for good cause, said board or officer may reinstate such license or registration.

§ 16. [Records Confidential.] Prescriptions, orders, and records, required by this act, and stocks of narcotic drugs, shall be open for inspection only to federal, state, county, and municipal officers, whose duty it is to enforce the laws of this state or of the United States relating to narcotic drugs. No officer hav-

ing knowledge by virtue of his office of any such prescription, order, or record shall divulge such knowledge, except in connection with a prosecution or proceeding in court or before a licensing or registration board or officer, to which prosecution or proceeding the person to whom such prescriptions, orders or records relate is a party.

§ 17. [Fraud or Deceit.] (1) No person shall obtain or attempt to obtain a narcotic drug, or procure or attempt to procure the administration of a narcotic drug, (a) by fraud, deceit, misrepresentation, or subterfuge; or (b) by the forgery or alteration of a prescription or of any written order; or (c) by the concealment of a material fact; or (d) by the use of a false name or the giving of a false address.

(2) Information communicated to a physician in an effort unlawfully to procure a narcotic drug, or unlawfully to procure the administration of any such drug, shall not be deemed a privileged communication.

(3) No person shall wilfully make a false statement in any prescription, order, report, or record, required by this act.

(4) No person shall, for the purpose of obtaining a narcotic drug, falsely assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person.

(5) No person shall make or utter any false or forged prescription or false or forged written order.

(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs.

(7) The provisions of this section shall apply to all transactions relating to narcotic drugs under the provisions of Section 8 of this act, in the same way as they apply to transactions under all other sections.

§ 18. [Exceptions and Exemptions Not Required to be Negatived.] In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this act, it shall not be necessary to negative any exception, excuse, proviso, or exemption, contained in this act, and the burden of proof of any such exception, excuse, proviso, or exemption, shall be upon the defendant.

§ 19. [Enforcement and Cooperation.] It is hereby made the duty of the [Insert here proper official designation of state officer or board], its officers, agents, inspectors, and rep-

representatives, and of all peace officers within the state, and of all county attorneys, to enforce all provisions of this act, except those specifically delegated, and to cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states, relating to narcotic drugs.

§ 20. [Penalties.] Any person violating any provision of this act shall upon conviction be punished, for the first offense, by a fine not exceeding () dollars, or by imprisonment in (jail) for not exceeding (), or by both such fine and imprisonment, and for any subsequent offense, by a fine not exceeding () dollars, or by imprisonment in (state prison) for not exceeding (), or by both such fine and imprisonment.

§ 21. [Effect of Acquittal or Conviction under Federal Narcotic Laws.] No person shall be prosecuted for a violation of any provision of this act if such person has been acquitted or convicted under the Federal Narcotic Laws of the same act or omission which, it is alleged, constitutes a violation of this act.

§ 22. [Constitutionality.] If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

§ 23. [Interpretation.] This act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it.

§ 24. [Inconsistent Laws Repealed.] All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

§ 25. [Name of Act.] This act may be cited as the Uniform Narcotic Drug Act.

§ 26. [Time of Taking Effect.] This act shall take effect [Insert here statement of time when the act is to take effect.]

APPENDIX 2

All of the text of the Harrison Narcotic Act is set forth in Chapter 1, Part II.

MARIHUANA ACT

26 U.S.C.A. §§ 2590-2606, 3230-3239.

The section numbers refer to the sections in the New Internal Revenue Code of 1939, reprinted from the United States Code Current Service Pamphlet 1939 No. 1, Copyright by the West Publishing Co. and Edward Thompson.

SUBCHAPTER C—MARIHUANA

§ 2590. Tax

(a) **Rate.** There shall be levied, collected, and paid upon all transfers of marihuana which are required by section 2591 to be carried out in pursuance of written order forms taxes at the following rates:

(1) **Transfers to special taxpayers.** Upon each transfer to any person who has paid the special tax and registered under sections 3230 and 3231, \$1 per ounce of marihuana or fraction thereof.

(2) **Transfers to others.** Upon each transfer to any person who has not paid the special tax and registered under sections 3230 and 3231, \$100 per ounce of marihuana or fraction thereof.

(b) **By whom paid.** Such tax shall be paid by the transferee at the time of securing each order form and shall be in addition to the price of such form. Such transferee shall be liable for the tax imposed by this section but in the event that the transfer is made in violation of section 2591 without an order form and without payment of the

transfer tax imposed by this section, the transferor shall also be liable for such tax.

(c) How paid

(1) **Stamps.** Payment of the tax herein provided shall be represented by appropriate stamps to be provided by the Secretary.

(2) Assessment

For assessment in case of omitted taxes payable by stamp, see section 3311 and section 3640.

(d) Registration and special tax

For requirements as to registration and special tax, see part VI of subchapter A of chapter 27.

§ 2591. Order forms

(a) **General requirement.** It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 3230 and 3231, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary.

(b) **Exceptions.** Subject to such regulations as the Secretary may prescribe, nothing contained in this section shall apply—

(1) **Professional practice.** To a transfer of marihuana to a patient by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3231, in the course of his professional practice only: *Provided*, That such physician, dentist, veterinary surgeon, or other practitioner shall keep a record of all such marihuana transferred, showing the amount transferred and the name and address of the patient to whom such marihuana is transferred, and such record shall be kept for a period of two years from the date of the transfer of such marihuana, and subject to inspection as provided in section 2595.

(2) **Prescriptions.** To a transfer of marihuana, made in good faith by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3231: *Provided*, That such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, veterinary surgeon, or other prac-

tioner who issues the same: *Provided further*, That such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled so as to be readily accessible for inspection by the officers, agents, employees, and officials mentioned in section 2595.

(3) Exportation. To the sale, exportation, shipment, or delivery of marihuana by any person within the United States, any Territory, the District of Columbia, or any of the insular possessions of the United States, to any person in any foreign country regulating the entry of marihuana, if such sale, shipment, or delivery of marihuana is made in accordance with such regulations for importation into such foreign country as are prescribed by such foreign country, such regulations to be promulgated from time to time by the Secretary of State of the United States.

(4) Government and state officials. To a transfer of marihuana to any officer or employee of the United States Government or of any State, Territorial, District, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for Government, State, Territorial, District, county, or municipal or insular hospitals or prisons.

(5) Certain seeds. To a transfer of any seeds of the plant *Cannabis sativa* L. to any person registered under section 3231.

(c) Supply. The Secretary shall cause suitable forms to be prepared for the purposes before mentioned and shall cause them to be distributed to collectors for sale. The price at which such forms shall be sold by said collectors shall be fixed by the Secretary, but shall not exceed 2 cents each. Whenever any collector shall sell any of such forms he shall cause the date of sale, the name and address of the proposed vendor, the name and address of the purchaser, and the amount of marihuana ordered to be plainly written or stamped thereon before delivering the same.

(d) Preservation. Each such order form sold by a collector shall be prepared by him and shall include an original and two copies, any one of which shall be admissible in evidence as an original. The original and one copy shall be given by the collector to the purchaser thereof. The

original shall in turn be given by the purchaser thereof to any person who shall, in pursuance thereof, transfer marihuana to him and shall be preserved by such person for a period of two years so as to be readily accessible for inspection by any officer, agent, or employee mentioned in section 2595. The copy given to the purchaser by the collector shall be retained by the purchaser and preserved for a period of two years so as to be readily accessible to inspection by any officer, agent, or employee mentioned in section 2595. The second copy shall be preserved in the records of the collector.

§ 2592. Stamps

(a) **Affixing.** The stamps provided in section 2590 (c) (1) shall be affixed by the collector or his representative to the original order form.

(b) **Other laws applicable.** All provisions of law relating to the engraving, issuance, sale, accountability, cancellation, and destruction of tax-paid stamps provided for in the internal-revenue laws shall, insofar as applicable and not inconsistent with this subchapter, be extended and made to apply to stamps provided for in section 2590 (c) (1).

(c) Cross reference

For general provisions relating to stamps, see part I of subchapter A of chapter 28 of I.R.C.

§ 2593. Unlawful possession

(a) **Persons in general.** It shall be unlawful for any person who is a transferee required to pay the transfer tax imposed by section 2590 (a) to acquire or otherwise obtain any marihuana without having paid such tax; and proof that any person shall have had in his possession any marihuana and shall have failed, after reasonable notice and demand by the collector, to produce the order form required by section 2591 to be retained by him, shall be presumptive evidence of guilt under this section and of liability for the tax imposed by section 2590 (a).

(b) **Government and state officials.** No liability shall be imposed by virtue of this section upon any duly authorized officer of the Treasury Department engaged in the enforcement of his subchapter and part VI of subchapter A of

chapter 27 or upon any duly authorized officer of any State, or Territory, or of any political subdivision thereof, or the District of Columbia, or of any insular possession of the United States, who shall be engaged in the enforcement of any law or municipal ordinance dealing with the production, sale, prescribing, dispensing, dealing in, or distributing of marihuana.

§ 2594. Records, statements and returns

(a) **General requirement.** Every person liable to any tax imposed by this subchapter or part VI of subchapter A of chapter 27 shall keep such books and records, render under oath such statements, make such returns, and comply with such rules and regulations as the Secretary may from time to time prescribe.

(b) **Return by registrants of marihuana**

For returns by registrants of marihuana, see section 3233 (a) of chapter 27, of I.R.C.

§ 2595. Inspection of returns, order forms and prescriptions

The order forms and copies thereof and the prescriptions and records required to be preserved under the provisions of section 2591, and the statements or returns filed in the office of the collector of the district under the provisions of section 3233 shall be open to inspection by officers, agents, and employees of the Treasury Department duly authorized for that purpose, and such officers of any State, or Territory, or of any political subdivision thereof, or the District of Columbia, or of any insular possession of the United States as shall be charged with the enforcement of any law or municipal ordinance regulating the production, sale, prescribing, dispensing, dealing in, or distributing of marihuana. Each collector shall be authorized to furnish, upon written request, copies of any of the said statements or returns filed in his office to any of such officials of any State or Territory, or political subdivision thereof, or the District of Columbia, or any insular possession of the United States as shall be entitled to inspect the said statements or returns filed in the office of the said collector, upon the payment of a fee of \$1 for each 100 words or fraction thereof in the copy or copies so requested.

§ 2596. Penalties

Any person who is convicted of a violation of any provision of this subchapter or part VI of subchapter A of chapter 27 shall be fined not more than \$2,000 or imprisoned not more than five years, or both, in the discretion of the court.

§ 2597. Burden of proof

It shall not be necessary to negative any exemptions set forth in this subchapter or part VI of subchapter A of chapter 27 in any complaint, information, indictment, or other writ or proceeding laid or brought under this subchapter or part VI of subchapter A of chapter 27 and the burden of proof of any such exemption shall be upon the defendant. In the absence of the production of evidence by the defendant that he has complied with the provisions of section 3231 relating to registration or that he has complied with the provisions of section 2591 relating to order forms, he shall be presumed not to have complied with such provisions of such sections, as the case may be.

§ 2598. Forfeitures

(a) **Unlawful importation, manufacture, or transfer.** Any marihuana which has been imported, manufactured, compounded, transferred, or produced in violation of any of the provisions of this subchapter or part VI of subchapter A of chapter 27 shall be subject to seizure and forfeiture and, except as inconsistent with the provisions of such subchapter and part, all the provisions of internal-revenue laws relating to searches, seizures, and forfeitures are extended to include marihuana.

(b) **Ownership by violators.** Any marihuana which may be seized by the United States Government from any person or persons charged with any violation of this subchapter or part VI of subchapter A of chapter 27 shall upon conviction of the person or persons from whom seized be confiscated by and forfeited to the United States.

(c) **Unknown ownership.** Any marihuana seized or coming into the possession of the United States in the enforcement of this subchapter or part VI of subchapter A of chapter 27, the owner or owners of which are unknown, shall be confiscated by and forfeited to the United States.

(d) **Disposal.** The Secretary is hereby directed to destroy any marihuana confiscated by and forfeited to the United States under this section or to deliver such marihuana to any department, bureau, or other agency of the United States Government, upon proper application therefor under such regulations as may be prescribed by the Secretary.

§ 2599. Regulations

The Secretary is authorized to make, prescribe, and publish all necessary rules and regulations for carrying out the provisions of this subchapter and part VI of subchapter A of chapter 27.

§ 2600. Delegation of powers

The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties conferred or imposed upon him by this subchapter or part VI of subchapter A of chapter 27 upon such officers or employees of the Treasury Department as he shall designate or appoint.

§ 2601. Other laws applicable

All provisions of law (including penalties) applicable in respect of the taxes imposed by section 2550 of this chapter and section 3220 of chapter 27, shall, insofar as not inconsistent with this subchapter and part VI of subchapter A of chapter 27, be applicable in respect of the taxes imposed by such subchapter and part.

§ 2602. Territorial extent of law

The provisions of this subchapter and part VI of subchapter A of chapter 27 shall apply to the several States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, and the insular possessions of the United States, except the Philippine Islands.

§ 2603. Administration in insular possessions

(a) **Puerto Rico.** In Puerto Rico the administration of this subchapter and part VI of subchapter A of chapter 27, the collection of the special taxes and transfer taxes, and the issuance of the order forms provided for in section 2591 shall be performed by the appropriate internal-rev

enue officers of that government, and all revenues collected under this subchapter and part VI of subchapter A of chapter 27 in Puerto Rico shall accrue intact to the general government thereof.

(b) **Virgin Islands.** The President shall be authorized and directed to issue such Executive orders as will carry into effect in the Virgin Islands the intent and purpose of this subchapter and part VI of subchapter A of chapter 27 by providing for the registration with appropriate officers and the imposition of the special and transfer taxes upon all persons in the Virgin Islands who import, manufacture, produce, compound, sell, deal in, dispense, prescribe, administer, or give away marihuana.

§ 2604. Definitions

For definitions of the following, see the subsections of section 3238 indicated below:

Person

Subsection (a).

Producer

Subsection (c).

Marihuana

Subsection (b).

Transfer or transferred

Subsection (d).

SUBCHAPTER D—DELEGATION OF POWERS AND DUTIES BY THE SECRETARY

§ 2606. Authorization

The Secretary is authorized to confer or impose any of the rights, privileges, powers, and duties in respect of narcotic drugs conferred upon him by subchapters A and B of this chapter and part V of subchapter A of chapter 27 upon the Commissioner of Narcotics, or any officer or employee of the Bureau of Narcotics, and to confer or impose upon the Commissioner of Internal Revenue, or any of the officers or employees of the Bureau of Internal Revenue, any of such rights, privileges, powers, and duties which, in the opinion of the Secretary, may be necessary in connection with internal revenue taxes.

§ 3230. Tax

(a) **Liability and time for payment of tax.** Every person who imports, manufactures, produces, compounds, sells, deals in, dispenses, prescribes, administers, or gives away marihuana shall (1) before engaging in any of the above-mentioned activities, and (2) thereafter, on or before July 1 of each year, pay the following special taxes respectively:

(1) **Importers, manufacturers, and compounders.** Importers, manufacturers, and compounders of marihuana, \$24 per year.

(2) **Producers.** Producers of marihuana (except those included within subdivision (4) of this subsection), \$1 per year, or fraction thereof, during which they engage in such activity.

(3) **Physicians, dentists, veterinary surgeons, and other practitioners.** Physicians, dentists, veterinary surgeons, and other practitioners who distribute, dispense, give away, administer, or prescribe marihuana to patients upon whom they in the course of their professional practice are in attendance, \$1 per year or fraction thereof during which they engage in any of such activities.

(4) **Persons engaged in research, instruction, or analysis.** Any person not registered as an importer, manufacturer, producer, or compounder who obtains and uses marihuana in a laboratory for the purpose of research, instruction, or analysis, or who produces marihuana for any such purpose, \$1 per year, or fraction thereof, during which he engages in such activities.

(5) **Persons not otherwise taxed.** Any person who is not a physician, dentist, veterinary surgeon, or other practitioner and who deals in, dispenses, or gives away marihuana, \$3 per year: *Provided*, That any person who has registered and paid the special tax as an importer, manufacturer, compounder, or producer, as required by subdivisions (1) and (2) of this subsection, may deal in, dispense, or give away marihuana imported, manufactured, compounded, or produced by him without further payment of the tax imposed by this section.

(b) **Computation of tax.** Where a tax under subdivision (1) or (5) of subsection (a) is payable on July 1 of

any year it shall be computed for one year; where any such tax is payable on any other day it shall be computed proportionately from the first day of the month in which the liability for the tax accrued to the following July 1.

(c) Liability in case of activities in more than one place. In the event that any person subject to a tax imposed by this section engages in any of the activities enumerated in subsection (a) of this section at more than one place, such person shall pay the tax with respect to each such place.

(d) Liability in case of more than one activity by same person at same time. Except as otherwise provided, whenever more than one of the activities enumerated in subsection (a) of this section is carried on by the same person at the same time, such person shall pay the tax for each such activity, according to the respective rates prescribed.

§ 3231. Registration

Any person subject to the tax imposed by section 3230 shall, upon payment of such tax, register his name or style and his place or places of business with the collector of the district in which such place or places of business are located.

§ 3232. Exemption from tax and registration

(a) Employees. No employee of any person who has paid the special tax and registered, as required by sections 3230 and 3231, acting within the scope of his employment, shall be required to register and pay such special tax.

(b) Government and state officials

(1) In general. An officer or employee of the United States, any State, Territory, the District of Columbia, or insular possession, or political subdivision, who, in the exercise of his official duties, engages in any of the activities enumerated in section 3230 shall not be required to register or pay the special tax, but his right to this exemption shall be evidenced in such manner as the Secretary may by regulations prescribe.

(2) Cross reference

For authority of the President to issue executive orders providing for the registration and the imposition of special taxes upon persons in the Virgin Islands, see section 2603 (b), of L.R.C.

§ 3233. Returns

(a) **Registrants.** Any person who shall be registered under the provisions of section 3231 in any internal-revenue district shall, whenever required so to do by the collector of the district, render to the collector a true and correct statement or return, verified by affidavits, setting forth the quantity of marihuana received or harvested by him during such period immediately preceding the demand of the collector, not exceeding three months, as the said collector may fix and determine. If such person is not solely a producer, he shall set forth in such statement or return the names of the persons from whom said marihuana was received, the quantity in each instance received from such persons, and the date when received.

(b) Persons liable for tax

For general requirement as to records, statements and returns in the case of persons liable for tax, see section 2594.

§ 3234. Unlawful acts in case of failure to register and pay special tax**(a) Trafficking**

(1) **Liability.** It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 3230 and 3231 to import, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax.

(2) **Enforcement of liability.** In any suit or proceeding to enforce the liability imposed by this section or sections 3230 and 3231, if proof is made that marihuana was at any time growing upon land under the control of the defendant, such proof shall be presumptive evidence that at such time the defendant was a producer and liable under this section as well as under sections 3230 and 3231.

(b) **Transportation.** It shall be unlawful for any person who shall not have paid the special tax and registered, as required by sections 3230 and 3231, to send, ship, carry, transport, or deliver any marihuana within any Territory, the District of Columbia, or any insular possession, or from any State, Territory, the District of Columbia, any insular possession of the United States, or the Canal Zone, into any other State, Territory, the District of Columbia, or in-

sular possession of the United States: *Provided*, That nothing contained in this section shall apply to any common carrier engaged in transporting marihuana; or to any employee of any person who shall have registered and paid the special tax as required by sections 3230 and 3231 while acting within the scope of his employment; or to any person who shall deliver marihuana which has been prescribed or dispensed by a physician, dentist, veterinary surgeon, or other practitioner registered under section 3231, who has been employed to prescribe for the particular patient receiving such marihuana; or to any United States, State, county, municipal, District, Territorial, or insular officer or official acting within the scope of his official duties.

§ 3235. Penalties

For penalties for violating or failing to comply with any of the provisions of this part, see section 2596.

§ 3236. List of special taxpayers

Collectors are authorized to furnish, upon written request, to any person a certified copy of the names of any or all persons who may be listed in their respective collection districts as special taxpayers under section 3230, upon payment of a fee of \$1 for each one hundred of such names or fraction thereof upon such copy so requested.

§ 3237. Other laws applicable

All provisions of law (including penalties) applicable in respect of the taxes imposed by sections 2550 and 3220 shall, insofar as not inconsistent with this part, be applicable in respect of the taxes imposed by this part.

§ 3238. Definitions

When used in this part and subchapter C of chapter 23.

(a) **Person.** The term "person" means an individual, a partnership, trust, association, company, or corporation and includes an officer or employee of a trust, association, company, or corporation, or a member or employee of a partnership, who, as such officer, employee, or member, is under a duty to perform any act in respect of which any violation of this part or subchapter C of chapter 23 occurs.

(b) **Marihuana.** The term "marihuana" means all parts of the plant *Cannabis sativa* L., whether growing or not;

the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

(c) **Producer.** The term "producer" means any person who (1) plants, cultivates, or in any way facilitates the natural growth of marihuana; or (2) harvests and transfers or makes use of marihuana.

(d) **Transfer or transferred.** The term "transfer" or "transferred" means any type of disposition resulting in a change of possession but shall not include a transfer to a common carrier for the purpose of transporting marihuana.

§ 3239. Cross reference

For provisions authorizing seizure and confiscation of marihuana for persons violating this part, see section 2598 of chapter 23, I.R.C.

For provisions giving the Secretary authority to prescribe rules and regulations to enforce this part, see section 2599 of chapter 23, I.R.C.

For authority of the Secretary to delegate the powers conferred on him by this part to officers and employees of the Treasury Department, see section 2600 of chapter 23, I.R.C.

For the territorial extent of this part, see section 2602 of chapter 23, I.R.C.

For administration of the special taxes in Puerto Rico, see section 2603 (a) of chapter 23, I.R.C.

For burden of proof in the case of exemptions in this part, see section 2597 of chapter 23, I.R.C.

APPENDIX 3

FEDERAL FOOD, DRUG, AND COSMETIC ACT

Section numbers refer to sections of U.S.C.A. title 21, Food and Drugs. Reprinted from United States Code Annotated, copyrighted 1939 by West Publishing Co. and Edward Thompson Company.

SUBCHAPTER I—SHORT TITLE

§ 301. Short title

This chapter may be cited as the Federal Food, Drug, and Cosmetic Act. June 25, 1938, c. 675, § 1, 52 Stat. 1040.

Effective twelve months after date of enactment, by section 392(a), post.

SUBCHAPTER II—DEFINITIONS

§ 321. Definitions; generally

For the purposes of this chapter—

(a) The term "Territory" means any Territory or possession of the United States, including the District of Columbia and excluding the Canal Zone.

(b) The term "interstate commerce" means (1) commerce between any State or Territory and any place outside thereof, and (2) commerce within the District of Columbia or within any other Territory not organized with a legislative body.

(c) The term "Department" means the Department of Agriculture of the United States.

(d) The term "Secretary" means the Secretary of Agriculture.

(e) The term "person" includes individual, partnership, corporation, and association.

(f) The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(g) The term "drug" means (1) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National For-

mulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

(h) The term "device" (except when used in paragraph (n) of this section and in sections 331 (i), 343 (f), 352 (c), and 362 (c)) means instruments, apparatus, and contrivances, including their components, parts, and accessories, intended (1) for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

(i) The term "cosmetic" means (1) articles intended to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such articles; except that such term shall not include soap.

(j) The term "official compendium" means the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, official National Formulary, or any supplement to any of them.

(k) The term "label" means a display of written, printed, or graphic matter upon the immediate container of any article; and a requirement made by or under authority of this chapter that any word, statement, or other information appear on the label shall not be considered to be complied with unless such word, statement, or other information also appears on the outside container or wrapper, if any there be, of the retail package of such article, or is easily legible through the outside container or wrapper.

(l) The term "immediate container" does not include package liners.

(m) The term "labeling" means all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.

(n) If an article is alleged to be misbranded because the labeling is misleading, then in determining whether the la-

beling is misleading there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, or any combination thereof, but also the extent to which the labeling fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the article to which the labeling relates under the conditions of use prescribed in the labeling thereof or under such conditions of use as are customary or usual.

(o) The representation of a drug, in its labeling, as an antiseptic shall be considered to be a representation that it is a germicide, except in the case of a drug purporting to be, or represented as, an antiseptic for inhibitory use as a wet dressing, ointment, dusting powder, or such other use as involves prolonged contact with the body.

(p) The term "new drug" means—

(1) Any drug the composition of which is such that such drug is not generally recognized, among experts qualified by scientific training and experience to evaluate the safety of drugs, as safe for use under the conditions prescribed, recommended, or suggested in the labeling thereof, except that such a drug not so recognized shall not be deemed to be a "new drug" if at any time prior to the enactment of this Act it was subject to the Food and Drugs Act of June 30, 1906, as amended,¹ and if at such time its labeling contained the same representations concerning the conditions of its use; or

(2) Any drug the composition of which is such that such drug, as a result of investigations to determine its safety for use under such conditions, has become so recognized, but which has not, otherwise than in such investigations, been used to a material extent or for a material time under such conditions. June 25, 1938, c. 675, § 201, 52 Stat. 1041.

Effective twelve months after date of enactment by section 392(a), post.

§ 321a. Same; butter

For the purposes of the Food and Drug Act of June 30, 1906 (Thirty-fourth Statutes at Large, page 768),¹ "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been

allowed for. Mar. 4, 1923, c. 268, 42 Stat. 1500; June 25, 1938, c. 675, § 902 (a), 52 Stat. 1059.

This section, which is not a provision of the Federal Food, Drug, and Cosmetic Act, was formerly section 6 of this title. Act June 25, 1938, cited to the text, provided that the section should remain in force and effect and be applicable to the provisions of this chapter. See section 392(a), post.

§ 321b. Same; package

The word "package" where it occurs the second and last time in the act entitled "An act to amend section 8 of an act entitled, 'An act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous deleterious foods, drugs, medicines, and liquors, and for regulating traffic therein, and for other purposes,'" approved March 3, 1913,¹ shall include and shall be construed to include wrapped meats inclosed in papers or other materials as prepared by the manufacturers thereof for sale. July 24, 1919, c. 26, 41 Stat. 271; June 25, 1938, c. 675, § 902 (a), 52 Stat. 1059.

This section, which is not a provision of the Federal Food, Drug, and Cosmetic Act, was made applicable to that Act by Act June 25, 1938, cited to the text. See section 392(a) post.

This section was formerly the last sentence of paragraph Third of section 10 of this title.

Act March 3, 1913 [c. 117, 37 Stat. 732], mentioned in the text of this section, amended paragraph Third of the Food and Drugs Act of June 30, 1906, c. 3915, § 8, 34 Stat. 771 [first two sentences of paragraph Third of section 10 of this title], to read as follows: "Third. If in package form, the quantity of the contents be not plainly and conspicuously marked on the outside of the package in terms of weight, measure, or numerical count: *Provided, however,* That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established by rules and regulations made in accordance with the provisions of Section three of this Act [section 3 of this title]."

SUBCHAPTER III—PROHIBITED ACTS AND PENALTIES

§ 331. Prohibited acts

The following acts and the causing thereof are hereby prohibited:

(a) The introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded.

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

(c) The receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded, and the delivery or proffered delivery thereof for pay or otherwise.

(d) The introduction or delivery for introduction into interstate commerce of any article in violation of section 344 or 355.

(e) The refusal to permit access to or copying of any record as required by section 373.

(f) The refusal to permit entry or inspection as authorized by section 374.

(g) The manufacture within any Territory of any food, drug, device, or cosmetic that is adulterated or misbranded.

(h) The giving of a guaranty or undertaking referred to in section 333 (c) (2), which guaranty or undertaking is false, except by a person who relied upon a guaranty or undertaking to the same effect signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the food, drug, device, or cosmetic; or the giving of a guaranty or undertaking referred to in section 333 (c) (3), which guaranty or undertaking is false.

(i) Forging, counterfeiting, simulating, or falsely representing, or without proper authority using any mark, stamp, tag, label, or other identification device authorized or required by regulations promulgated under the provisions of section 344, 346 (b), 354, or 364.

(j) The using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under authority of section 344, 355, or 374 concerning any method or process which as a trade secret is entitled to protection.

(k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale after shipment in interstate commerce and results in such article being misbranded.

(l) The using, or the labeling of any drug or in any advertising relating to such drug, of any representation or suggestion that an application with respect to such drug is effective under section 355, or that such drug complies with the

provisions of such section. June 25, 1938, c. 675, § 301, 52 Stat. 1042.

Violation of injunction or restraining order as violation of chapter, see section 332 (b), post.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 332. Injunction proceedings

Jurisdiction of courts

(a) The district courts of the United States and the United States courts of the Territories shall have jurisdiction, for cause shown, and subject to the provisions of section 381 (relating to notice to opposite party) of Title 28, as amended, to restrain violations of section 331, except paragraphs (e), (f), (h), (i), and (j).

Violation of injunction

(b) In case of violation of an injunction or restraining order issued under this section, which also constitutes a violation of this chapter, trial shall be by the court, or, upon demand of the accused, by a jury. Such trial shall be conducted in accordance with the practice and procedure applicable in the case of proceedings subject to the provisions of section 387 of Title 28, as amended. June 25, 1938, c. 675, § 302, 52 Stat. 1043.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 333. Penalties

Violation of section 331

(a) Any person who violates any of the provisions of section 331 shall be guilty of a misdemeanor and shall on conviction thereof be subject to imprisonment for not more than one year, or a fine of not more than \$1,000, or both such imprisonment and fine; but if the violation is committed after a conviction of such person under this section has become final such person shall be subject to imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

Same; with intent to defraud or mislead

(b) Notwithstanding the provisions of subsection (a) of this section, in case of a violation of any of the provisions of section 331, with intent to defraud or mislead, the penalty

shall be imprisonment for not more than three years, or a fine of not more than \$10,000, or both such imprisonment and fine.

Exceptions in certain cases of good faith, etc.

(c) No person shall be subject to the penalties of subsection (a) of this section, (1) for having received in interstate commerce any article and delivered it or proffered delivery of it, if such delivery or proffer was made in good faith, unless he refuses to furnish on request of an officer or employee duly designated by the Secretary the name and address of the person from whom he purchased or received such article and copies of all documents, if any there be, pertaining to the delivery of the article to him; or (2) for having violated section 331 (a) or (d), if he establishes a guaranty or undertaking signed by, and containing the name and address of, the person residing in the United States from whom he received in good faith the article, to the effect, in case of an alleged violation of section 331 (a), that such article is not adulterated or misbranded, within the meaning of this chapter, designating this chapter, or to the effect, in case of an alleged violation of section 331 (d), that such article is not an article which may not, under the provisions of section 344 or 355, be introduced into interstate commerce; or (3) for having violated section 331 (a), where the violation exists because the article is adulterated by reason of containing a coal-tar color not from a batch certified in accordance with regulations promulgated by the Secretary under this chapter, if such person establishes a guaranty or undertaking signed by, and containing the name and address of, the manufacturer of the coal-tar color, to the effect that such color was from a batch certified in accordance with the applicable regulations promulgated by the Secretary under this chapter. June 25, 1938, c. 675, § 303, 52 Stat. 1043.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 334. Seizure

Grounds and jurisdiction

(a) Any article of food, drug, device, or cosmetic that is adulterated or misbranded when introduced into or while in interstate commerce, or which may not, under the provisions of section 344 or 355, be introduced into interstate commerce, shall be liable to be proceeded against while in interstate com-

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merce, or at any time thereafter, on libel of information and condemned in any district court of the United States within the jurisdiction of which the article is found: *Provided, however,* That no libel for condemnation shall be instituted under this chapter, for any alleged misbranding if there is pending in any court a libel for condemnation proceeding under this chapter based upon the same alleged misbranding, and not more than one such proceeding shall be instituted if no such proceeding is so pending, except that such limitations shall not apply (1) when such misbranding has been the basis of a prior judgment in favor of the United States, in a criminal, injunction, or libel for condemnation proceeding under this chapter, or (2) when the Secretary has probable cause to believe from facts found, without hearing, by him or any officer or employee of the Department that the misbranded article is dangerous to health, or that the labeling of the misbranded article is fraudulent, or would be in a material respect misleading to the injury or damage of the purchaser or consumer. In any case where the number of libel for condemnation proceedings is limited as above provided the proceeding pending or instituted shall, on application of the claimant, seasonably made, be removed for trial to any district agreed upon by stipulation between the parties, or, in case of failure to so stipulate within a reasonable time, the claimant may apply to the court of the district in which the seizure has been made, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, to which the case shall be removed for trial.

Procedure; multiplicity of pending proceedings

(b) The article shall be liable to seizure by process pursuant to the libel, and the procedure in cases under this section shall conform, as nearly as may be, to the procedure in admiralty; except that on demand of either party any issue of fact joined in any such case shall be tried by jury. When libel for condemnation proceedings under this section, involving the same claimant and the same issues of adulteration or misbranding, are pending in two or more jurisdictions, such pending proceedings, upon application of the claimant seasonably made to the court of one such jurisdiction, shall be

consolidated for trial by order of such court, and tried in (1) any district selected by the claimant where one of such proceedings is pending; or (2) a district agreed upon by stipulation between the parties. If no order for consolidation is so made within a reasonable time, the claimant may apply to the court of one such jurisdiction, and such court (after giving the United States attorney for such district reasonable notice and opportunity to be heard) shall by order, unless good cause to the contrary is shown, specify a district of reasonable proximity to the claimant's principal place of business, in which all such pending proceedings shall be consolidated for trial and tried. Such order of consolidation shall not apply so as to require the removal of any case the date for trial of which has been fixed. The court granting such order shall give prompt notification thereof to the other courts having jurisdiction of the cases covered thereby.

Availability of samples or seized goods prior to trial

(c) The court at any time after seizure up to a reasonable time before trial shall by order allow any party to a condemnation proceeding, his attorney or agent, to obtain a representative sample of the article seized, and as regards fresh fruits or fresh vegetables, a true copy of the analysis on which the proceeding is based and the identifying marks or numbers, if any, of the packages from which the samples analyzed were obtained.

Disposition of goods after decree of condemnation

(d) Any food, drug, device, or cosmetic condemned under this section shall, after entry of the decree, be disposed of by destruction or sale as the court may, in accordance with the provisions of this section, direct and the proceeds thereof, if sold, less the legal costs and charges, shall be paid into the Treasury of the United States; but such article shall not be sold under such decree contrary to the provisions of this chapter or the laws of the jurisdiction in which sold: *Provided*, That after entry of the decree and upon the payment of the costs of such proceedings and the execution of a good and sufficient bond conditioned that such article shall not be sold or disposed of contrary to the provisions of this chapter or the laws of any State or Territory in which sold, the court may by order direct that such article be delivered to the owner thereof to be destroyed or brought into compliance with the provisions of this chapter under the supervision of an officer or

employee duly designated by the Secretary, and the expenses of such supervision shall be paid by the person obtaining release of the article under bond. Any article condemned by reason of its being an article which may not, under section 344 or 355, be introduced into interstate commerce, shall be disposed of by destruction.

Costs

(e) When a decree of condemnation is entered against the article, court costs and fees, and storage and other proper expenses, shall be awarded against the person, if any, intervening as claimant of the article.

Removal of case for trial

(f) In the case of removal for trial of any case as provided by subsection (a) or (b)—

(1) The clerk of the court from which removal is made shall promptly transmit to the court in which the case is to be tried all records in the case necessary in order that such court may exercise jurisdiction.

(2) The court to which such case was removed shall have the powers and be subject to the duties, for purposes of such case, which the court from which removal was made would have had, or to which such court would have been subject, if such case had not been removed. June 25, 1938, c. 675, § 304, 52 Stat. 1045.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 335. Hearing before report of criminal violation

Before any violation of this chapter is reported by the Secretary to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his views, either orally or in writing, with regard to such contemplated proceeding. June 25, 1938, c. 675, § 305, 52 Stat. 1045.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 336. Report of minor violations

Nothing in this chapter shall be construed as requiring the Secretary to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this chap-

ter whenever he believes that the public interest will be adequately served by a suitable written notice or warning. June 25, 1938, c. 675, § 306, 52 Stat. 1045.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 337. Proceedings in name of United States; provision as to subpoenas

All such proceedings for the enforcement, or to restrain violations, of this chapter shall be by and in the name of the United States. Notwithstanding the provisions of section 654 of Title 28, subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district in any such proceeding. June 25, 1938, c. 675, § 307, 52 Stat. 1046.

Effective twelve months after date of enactment, by section 392 (a), post.

SUBCHAPTER IV—FOOD

§ 341. Definitions and standards for food

Whenever in the judgment of the Secretary such action will promote honesty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container: *Provided*, That no definition and standard of identity and no standard of quality shall be established for fresh or dried fruits, fresh or dried vegetables, or butter, except that definitions and standards of identity may be established for avocados, cantaloupes, citrus fruits, and melons. In prescribing any standard of fill of container, the Secretary shall give due consideration to the natural shrinkage in storage and in transit of fresh natural food and to need for the necessary packing and protective material. In the prescribing of any standard of quality for any canned fruit or canned vegetable, consideration shall be given and due allowance made for the differing characteristics of the several varieties of such fruit or vegetable. In prescribing a definition and standard of identity for any food or class of food in which optional ingredients are permitted, the Secretary shall, for the purpose of promoting honesty and fair dealing in the interest of consum-

ers, designate the optional ingredients which shall be named on the label. Any definition and standard of identity prescribed by the Secretary for avocados, cantaloupes, citrus fruits, or melons shall relate only to maturity and to the effects of freezing. June 25, 1938, c. 675, § 401, 52 Stat. 1046.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 342. Adulterated food

A food shall be deemed to be adulterated—

Poisonous, insanitary, etc., ingredients

(a) (1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health; or (2) if it bears or contains any added poisonous or added deleterious substance which is unsafe within the meaning of section 346; or (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; or (5) if it is, in whole or in part, the product of a diseased animal or of an animal which has died otherwise than by slaughter; or (6) if its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

Absence, substitution, or addition of constituents

(b) (1) If any valuable constituent has been in whole or in part omitted or abstracted therefrom; or (2) if any substance has been substituted wholly or in part therefor; or (3) if damage or inferiority has been concealed in any manner; or (4) if any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is.

Uncertified coal tar coloring

(c) If it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regu-

lations as provided by section 346: *Provided, That this paragraph shall not apply to citrus fruit bearing or containing a coal-tar color if application for listing of such color has been made under this chapter and such application has not been acted on by the Secretary, if such color was commonly used prior to the enactment of this chapter for the purpose of coloring citrus fruit.*

Confectionery containing alcohol or nonnutritive substance

(d) If it is confectionery, and it bears or contains any alcohol or nonnutritive article or substance except harmless coloring, harmless flavoring, harmless resinous glaze not in excess of four-tenths of 1 per centum, natural gum, and pectin: *Provided, That this paragraph shall not apply to any confectionery by reason of its containing less than one-half of 1 per centum by volume of alcohol derived solely from the use of flavoring extracts, or to any chewing gum by reason of its containing harmless nonnutritive masticatory substances.* June 25, 1938, c. 675, § 402, 52 Stat. 1046.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 343. Misbranded food

A food shall be deemed to be misbranded—

False or misleading label

(a) If its labeling is false or misleading in any particular.

Offer for sale under another name

(b) If it is offered for sale under the name of another food.

Imitation of another food

(c) If it is an imitation of another food, unless its label bears, in type of uniform size and prominence, the word "imitation" and, immediately thereafter, the name of the food imitated.

Misleading container

(d) If its container is so made, formed, or filled as to be misleading.

Package form

(e) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical

count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

Prominence of information on label

(f) If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

Representation as to definition and standard of identity

(g) If it purports to be or is represented as a food for which a definition and standard of identity has been prescribed by regulations as provided by section 341, unless (1) it conforms to such definition and standard, and (2) its label bears the name of the food specified in the definition and standard, and, insofar as may be required by such regulations, the common names of optional ingredients (other than spices, flavoring, and coloring) present in such food.

Representation as to standards of quality and fill of container

(h) If it purports to be or is represented as—

(1) a food for which a standard of quality has been prescribed by regulations as provided by section 341, and its quality falls below such standard, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard; or

(2) a food for which a standard or standards of fill of container have been prescribed by regulations as provided by section 341, and it falls below the standard of fill of container applicable thereto, unless its label bears, in such manner and form as such regulations specify, a statement that it falls below such standard.

Label where no representation as to definition and standard of identity

(i) If it is not subject to the provisions of paragraph (g) of this section unless its label bears (1) the common or usual name of the food, if any there be, and (2) in case it is fabricated from two or more ingredients, the common or usual

name of each such ingredient; except that spices, flavorings, and colorings, other than those sold as such, may be designated as spices, flavorings, and colorings without naming each: *Provided*, That, to the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, or results in deception or unfair competition, exemptions shall be established by regulations promulgated by the Secretary.

Representation for special dietary use

(j) If it purports to be or is represented for special dietary uses, unless its label bears such information concerning its vitamin, mineral, and other dietary properties as the Secretary determines to be, and by regulations prescribes as, necessary in order fully to inform purchasers as to its value for such uses.

Artificial flavoring, etc.; exception of articles from (g), (i), and (k)

(k) If it bears or contains any artificial flavoring, artificial coloring, or chemical preservative, unless it bears labeling stating that fact: *Provided*, That to the extent that compliance with the requirements of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary. The provisions of this paragraph and paragraphs (g) and (i) with respect to artificial coloring shall not apply in the case of butter, cheese, or ice cream. June 25, 1938, c. 675, § 403, 52 Stat. 1047.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 344. Emergency permit control

Conditions on manufacturing, processing, etc., as health measure

(a) Whenever the Secretary finds after investigation that the distribution in interstate commerce of any class of food may, by reason of contamination with micro-organisms during the manufacture, processing, or packing thereof in any locality, be injurious to health, and that such injurious nature cannot be adequately determined after such articles have entered interstate commerce, he then, and in such case only, shall promulgate regulations providing for the issuance, to manufacturers, processors, or packers of such class of food in such locality, of permits to which shall be attached such conditions

governing the manufacture, processing, or packing of such class of food, for such temporary period of time, as may be necessary to protect the public health; and after the effective date of such regulations, and during such temporary period, no person shall introduce or deliver for introduction into interstate commerce any such food manufactured, processed, or packed by any such manufacturer, processor, or packer unless such manufacturer, processor, or packer holds a permit issued by the Secretary as provided by such regulations.

Violation of permit; suspension and reinstatement

(b) The Secretary is authorized to suspend immediately upon notice any permit issued under authority of this section if it is found that any of the conditions of the permit have been violated. The holder of a permit so suspended shall be privileged at any time to apply for the reinstatement of such permit, and the Secretary shall, immediately after prompt hearing and an inspection of the establishment, reinstate such permit if it is found that adequate measures have been taken to comply with and maintain the conditions of the permit, as originally issued or as amended.

Inspection of permit-holding establishments

(c) Any officer or employee duly designated by the Secretary shall have access to any factory or establishment, the operator of which holds a permit from the Secretary, for the purpose of ascertaining whether or not the conditions of the permit are being complied with, and denial of access for such inspection shall be ground for suspension of the permit until such access is freely given by the operator. June 25, 1938, c. 675, § 404, 52 Stat. 1048.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 345. Regulations making exemptions

The Secretary shall promulgate regulations exempting from any labeling requirement of this Act (1) small open containers of fresh fruits and fresh vegetables and (2) food which is, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such food is not adulterated or misbranded under the provisions of this Act upon removal from such processing,

labeling, or repacking establishment. June 25, 1938, c. 675, § 405, 52 Stat. 1049.

Effective twelve months after date of enactment, by section 302 (a), post.

§ 346. Tolerance for poisonous ingredients in food and certification of coal tar colors for food

Regulations for tolerating unavoidable poisonous ingredients

(a) Any poisonous or deleterious substance added to any food, except where such substance is required in the production thereof or cannot be avoided by good manufacturing practice shall be deemed to be unsafe for purposes of the application of clause (2) of section 342 (a); but when such substance is so required or cannot be so avoided, the Secretary shall promulgate regulations limiting the quantity therein or thereon to such extent as he finds necessary for the protection of public health, and any quantity exceeding the limits so fixed shall also be deemed to be unsafe for purposes of the application of clause (2) of section 342 (a). While such a regulation is in effect limiting the quantity of any such substance in the case of any food, such food shall not, by reason of bearing or containing any added amount of such substance, be considered to be adulterated within the meaning of clause (1) of section 342 (a). In determining the quantity of such added substance to be tolerated in or on different articles of food the Secretary shall take into account the extent to which the use of such substance is required or cannot be avoided in the production of each such article, and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.

Regulations for coal tar colors

(b) The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in food and for the certification of batches of such colors, with or without harmless diluents. June 25, 1938, c. 675, § 406, 52 Stat. 1049.

Effective twelve months after date of enactment, by section 302 (a), post.

SUBCHAPTER V—DRUGS AND DEVICES

§ 351. Adulterated drugs and devices

A drug or device shall be deemed to be adulterated—

Poisonous, insanitary, etc., ingredients

(a) (1) If it consists in whole or in part of any filthy, putrid, or decomposed substance; or (2) if it has been prepared, packed, or held under insanitary conditions whereby it may have been contaminated with filth, or whereby it may have been rendered injurious to health; or (3) if it is a drug and its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or (4) if it is a drug and it bears or contains, for purposes of coloring only, a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 354.

Strength, quality, or purity differing from official compendium

(b) If it purports to be or is represented as a drug the name of which is recognized in an official compendium, and its strength differs from, or its quality or purity falls below, the standard set forth in such compendium. Such determination as to strength, quality, or purity shall be made in accordance with the tests or methods of assay set forth in such compendium, except that whenever tests or methods of assay have not been prescribed in such compendium, or such tests or methods of assay as are prescribed are, in the judgment of the Secretary, insufficient for the making of such determination, the Secretary shall bring such fact to the attention of the appropriate body charged with the revision of such compendium, and if such body fails within a reasonable time to prescribe tests or methods of assay which, in the judgment of the Secretary, are sufficient for purposes of this paragraph, then the Secretary shall promulgate regulations prescribing appropriate tests or methods of assay in accordance with which such determination as to strength, quality, or purity shall be made. No drug defined in an official compendium shall be deemed to be adulterated under this paragraph because it differs from the standard of strength, quality, or purity therefor set forth in such compendium, if its difference in strength, quality, or purity from such standard is plainly stated on its label. When-

ever a drug is recognized in both the United States Pharmacopœia and the Homœopathic Pharmacopœia of the United States it shall be subject to the requirements of the United States Pharmacopœia unless it is labeled and offered for sale as a homœopathic drug, in which case it shall be subject to the provisions of the Homœopathic Pharmacopœia of the United States and not to those of the United States Pharmacopœia.

Misrepresentation of strength, etc., where drug is unrecognized in compendium

(c) If it is not subject to the provisions of paragraph (b) of this section and its strength differs from, or its purity or quality falls below, that which it purports or is represented to possess.

Mixture with or substitution of another substance

(d) If it is a drug and any substance has been (1) mixed or packed therewith so as to reduce its quality or strength or (2) substituted wholly or in part therefor. June 25, 1938, c. 675, § 501, 52 Stat. 1049.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 352. Misbranded drugs and devices

A drug or device shall be deemed to be misbranded—

False or misleading label

(a) If its labeling is false or misleading in any particular.

Package form; contents of label

(b) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quantity of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

Prominence of information on label

(c) If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to ren-

der it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

Habit forming substances

(d) If it is for use by man and contains any quantity of the narcotic or hypnotic substance alpha eucaïne, barbituric acid, betaeucaïne, bromal, cannabis, carbromal, chloral, coca, cocaine, codeine, heroin, marihuana, morphine, opium, paraldehyde, peyote, or sulphonmethane; or any chemical derivative of such substance, which derivative has been by the Secretary, after investigation, found to be, and by regulations designated as, habit forming; unless its label bears the name, and quantity or proportion of such substance or derivative and in juxtaposition therewith the statement "Warning—May be habit forming."

Designation of drug by name not in compendium

(e) If it is a drug and is not designated solely by a name recognized in an official compendium unless its label bears (1) the common or usual name of the drug, if such there be; and (2), in case it is fabricated from two or more ingredients, the common or usual name of each active ingredient, including the quantity, kind, and proportion of any alcohol, and also including, whether active or not, the name and quantity or proportion of any bromides, ether, chloroform, acetanilid, acetphenetidin, amidopyrine, antipyrine, atropine, hyoscine, hyoscyamine, arsenic, digitalis, digitalis glucosides, mercury, ouabain, strophanthin, strychnine, thyroid, or any derivative or preparation of any such substances, contained therein: *Provided*, That to the extent that compliance with the requirements of clause (2) of this paragraph is impracticable, exemptions shall be established by regulations promulgated by the Secretary.

Directions for use and warnings on label

(f) Unless its labeling bears (1) adequate directions for use; and (2) such adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users: *Provided*, That where any requirement of clause (1) of this paragraph, as applied to any drug or device, is not necessary for the protection

of the public health, the Secretary shall promulgate regulations exempting such drug or device from such requirement.

Representations as recognized drug; packing and labeling

(g) If it purports to be a drug the name of which is recognized in an official compendium, unless it is packaged and labeled as prescribed therein: *Provided*, That the method of packing may be modified with the consent of the Secretary. Whenever a drug is recognized in both the United States Pharmacopœia and the Homœopathic Pharmacopœia of the United States, it shall be subject to the requirements of the United States Pharmacopœia with respect to packaging and labeling unless it is labeled and offered for sale as a homœopathic drug, in which case it shall be subject to the provisions of the Homœopathic Pharmacopœia of the United States, and not to those of the United States Pharmacopœia.

Deteriorative drugs; packing and labeling

(h) If it has been found by the Secretary to be a drug liable to deterioration, unless it is packaged in such form and manner, and its label bears a statement of such precautions, as the Secretary shall by regulations require as necessary for the protection of the public health. No such regulation shall be established for any drug recognized in an official compendium until the Secretary shall have informed the appropriate body charged with the revision of such compendium of the need for such packaging or labeling requirements and such body shall have failed within a reasonable time to prescribe such requirements.

Drug; misleading container; imitation; offer for sale under another name

(i) (1) If it is a drug and its container is so made, formed, or filled as to be misleading; or (2) if it is an imitation of another drug; or (3) if it is offered for sale under the name of another drug:

Health-endangering when used as prescribed

(j) If it is dangerous to health when used in the dosage, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof. June 25, 1938, c. 675, § 502, 52 Stat. 1050, as amended June 23, 1939, c. 242, § 3, 53 Stat. 854.

Effective twelve months after date of enactment, except subsection (j), which is effective on date of enactment. See section 392(a), post.

Effective date of certain provisions postponed, see note under section 392, post.

§ 353. Exemptions in case of drugs and devices**Regulations for goods to be processed, labeled, or repacked elsewhere**

(a) The Secretary is hereby directed to promulgate regulations exempting from any labeling or packaging requirement of this chapter drugs and devices which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such drugs and devices are not adulterated or misbranded under the provisions of this chapter upon removal from such processing, labeling, or repacking establishment.

Prescription by physician, etc.

(b) A drug dispensed on a written prescription signed by a physician, dentist, or veterinarian (except a drug dispensed in the course of the conduct of a business of dispensing drugs pursuant to diagnosis by mail), shall if—

(1) such physician, dentist, or veterinarian is licensed by law to administer such drug, and

(2) such drug bears a label containing the name and place of business of the dispenser, the serial number and date of such prescription, and the name of such physician, dentist, or veterinarian,

be exempt from the requirements of section 352 (b) and (e), and (in case such prescription is marked by the writer thereof as not refillable or its refilling is prohibited by law) of section 352 (d). June 25, 1938, c. 675, § 503, 52 Stat. 1051.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 354. Certification of coal tar colors for drugs

The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in drugs for purposes of coloring only and for the certification of batches of such colors, with or without harmless diluents. June 25, 1938, c. 675, § 504, 52 Stat. 1052.

Effective twelve months after date of enactment, by section 392(a), post.

§ 355. New drugs**Necessity effective application**

(a) No person shall introduce or deliver for introduction into interstate commerce any new drug, unless an application filed pursuant to subsection (b) is effective with respect to such drug.

Filing application; contents

(b) Any person may file with the Secretary an application with respect to any drug subject to the provisions of subsection (a). Such person shall submit to the Secretary as a part of the application (1) full reports of investigations which have been made to show whether or not such drug is safe for use; (2) a full list of the articles used as components of such drug; (3) a full statement of the composition of such drug; (4) a full description of the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug; (5) such samples of such drug and of the articles used as components thereof as the Secretary may require; and (6) specimens of the labeling proposed to be used for such drug.

Effective date of application

(c) An application provided for in subsection (b) shall become effective on the sixtieth day after the filing thereof unless prior to such day the Secretary by notice to the applicant in writing postpones the effective date of the application to such time (not more than one hundred and eighty days after the filing thereof) as the Secretary deems necessary to enable him to study and investigate the application.

Grounds for refusing application to become effective

(d) If the Secretary finds, after due notice to the applicant and giving him an opportunity for a hearing, that (1) investigations, reports of which are required to be submitted to the Secretary pursuant to subsection (b), do not include adequate tests by all methods reasonably applicable to show whether or not such drug is safe for use under the conditions prescribed, recommended, or suggested in the proposed labeling thereof; (2) the results of such tests show that such drug is unsafe for use under such conditions or do not show that such drug is safe for use under such conditions; (3) the methods used in, and the facilities and controls used for, the manufacture, processing, and packing of such drug are inadequate to preserve its identity, strength, quality, and purity; or (4) upon

the basis of the information submitted to him as part of the application, or upon the basis of any other information before him with respect to such drug, he has insufficient information to determine whether such drug is safe for use under such conditions, he shall, prior to the effective date of the application, issue an order refusing to permit the application to become effective.

Suspension of effectiveness of application

(e) The effectiveness of an application with respect to any drug shall, after due notice and opportunity for hearing to the applicant, by order of the Secretary be suspended if the Secretary finds (1) that clinical experience, tests by new methods, or tests by methods not deemed reasonably applicable when such application became effective show that such drug is unsafe for use under the conditions of use upon the basis of which the application became effective, or (2) that the application contains any untrue statement of a material fact. The order shall state the findings upon which it is based.

Revocation of order refusing effectiveness

(f) An order refusing to permit an application with respect to any drug to become effective shall be revoked whenever the Secretary finds that the facts so require.

Service of orders

(g) Orders of the Secretary issued under this section shall be served (1) in person by any officer or employee of the department designated by the Secretary or (2) by mailing the order by registered mail addressed to the applicant or respondent at his last-known address in the records of the Secretary.

Appeal from order

(h) An appeal may be taken by the applicant from an order of the Secretary refusing to permit the application to become effective, or suspending the effectiveness of the application. Such appeal shall be taken by filing in the district court of the United States within any district wherein such applicant resides or has his principal place of business, or in the District Court of the United States for the District of Columbia, within sixty days after the entry of such order, a written petition praying that the order of the Secretary be set aside. A copy of such petition shall be forthwith served upon the Secretary, or upon any officer designated by him for that purpose, and thereupon the Secretary shall certify and file in the court a transcript

of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm or set aside such order. No objection to the order of the Secretary shall be considered by the court unless such objection shall have been urged before the Secretary or unless there were reasonable grounds for failure so to do. The finding of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive. If any person shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts by reason of the additional evidence so taken, and he shall file with the court such modified findings which, if supported by substantial evidence, shall be conclusive, and his recommendation, if any, for the setting aside of the original order. The judgment and decree of the court affirming or setting aside any such order of the Secretary shall be final, subject to review as provided in sections 225, 346, and 347 of Title 28, as amended, and in section 7, as amended, of the Act entitled "An Act to establish a Court of Appeals for the District of Columbia", approved February 9, 1893 [c. 74, 27 Stat. 435] (D.C.Code, title 18, sec. 26). The commencement of proceedings under this subsection shall not, unless specifically ordered by the court to the contrary, operate as a stay of the Secretary's order.

Exemption of drugs for research

(i) The Secretary shall promulgate regulations for exempting from the operation of this section drugs intended solely for investigational use by experts qualified by scientific training and experience to investigate the safety of drugs. June 25, 1938, c. 675, § 505, 52 Stat. 1052.

Effective on date of enactment, by section 392 (a), post.

SUBCHAPTER VI—COSMETICS

§ 361. Adulterated cosmetics

A cosmetic shall be deemed to be adulterated—

(a) If it bears or contains any poisonous or deleterious substance which may render it injurious to users under the conditions of use prescribed in the labeling thereof, or under such conditions of use as are customary or usual: *Provided*, That this provision shall not apply to coal-tar hair dye, the label of which bears the following legend conspicuously displayed thereon: "Caution—This product contains ingredients which may cause skin irritation on certain individuals and a preliminary test according to accompanying directions should first be made. This product must not be used for dyeing the eyelashes or eyebrows; to do so may cause blindness.", and the labeling of which bears adequate directions for such preliminary testing. For the purposes of this paragraph and paragraph (e) the term "hair dye" shall not include eyelash dyes or eyebrow dyes.

(b) If it consists in whole or in part of any filthy, putrid, or decomposed substance.

(c) If it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.

(d) If its container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health.

(e) If it is not a hair dye and it bears or contains a coal-tar color other than one from a batch that has been certified in accordance with regulations as provided by section 364. June 25, 1938, c. 675, § 601, 52 Stat. 1054.

Effective twelve months after date of enactment, except subsection (a), which, with certain exceptions, is effective on date of enactment. See section 392(a), *post*.

§ 362. Misbranded cosmetics

A cosmetic shall be deemed to be misbranded—

(a) If its labeling is false or misleading in any particular.

(b) If in package form unless it bears a label containing (1) the name and place of business of the manufacturer, packer, or distributor; and (2) an accurate statement of the quanti-

ty of the contents in terms of weight, measure, or numerical count: *Provided*, That under clause (2) of this paragraph reasonable variations shall be permitted, and exemptions as to small packages shall be established, by regulations prescribed by the Secretary.

(c) If any word, statement, or other information required by or under authority of this chapter to appear on the label or labeling is not prominently placed thereon with such conspicuousness (as compared with other words, statements, designs, or devices, in the labeling) and in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(d) If its container is so made, formed, or filled as to be misleading. June 25, 1938, c. 675, § 602, 52 Stat. 1054.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 363. Regulations making exemptions

The Secretary shall promulgate regulations exempting from any labeling requirement of this chapter cosmetics which are, in accordance with the practice of the trade, to be processed, labeled, or repacked in substantial quantities at establishments other than those where originally processed or packed, on condition that such cosmetics are not adulterated or misbranded under the provisions of this chapter upon removal from such processing, labeling, or repacking establishment. June 25, 1938, c. 675, § 603, 52 Stat. 1054.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 364. Certification of coal tar colors for cosmetics

The Secretary shall promulgate regulations providing for the listing of coal-tar colors which are harmless and suitable for use in cosmetics and for the certification of batches of such colors, with or without harmless diluents. June 25, 1938, c. 675, § 604, 52 Stat. 1055.

Effective twelve months after date of enactment, by section 392 (a), post.

SUBCHAPTER VII—GENERAL ADMINISTRATIVE PROVISIONS

§ 371. Regulations and hearings

Authority to promulgate regulations

(a) The authority to promulgate regulations for the efficient enforcement of this chapter, except as otherwise provided in this section, is hereby vested in the Secretary.

Regulations for imports and exports

(b) The Secretary of the Treasury and the Secretary of Agriculture shall jointly prescribe regulations for the efficient enforcement of the provisions of section 381, except as otherwise provided therein. Such regulations shall be promulgated in such manner and take effect at such time, after due notice, as the Secretary of Agriculture shall determine.

Conduct of hearings

(c) Hearings authorized or required by this chapter shall be conducted by the Secretary or such officer or employee as he may designate for the purpose.

Effectiveness of definitions and standards of identity.

(d) The definitions and standards of identity promulgated in accordance with the provisions of this chapter shall be effective for the purposes of the enforcement of this chapter, notwithstanding such definitions and standards as may be contained in other laws of the United States and regulations promulgated thereunder.

Hearings of proposed changes in regulations; orders

(e) The Secretary, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of this chapter: 341, 343 (j), 344 (a), 346 (a) and (b), 351 (b), 352 (d), 352 (h), 354, and 364. The Secretary shall give appropriate notice of the hearing, and the notice shall set forth the proposal in general terms and specify the time and place for a public hearing to be held thereon not less than thirty days after the date of the notice, except that the public hearing on regulations under section 344 (a) may be held within a reasonable time, to be fixed by the Secretary, after notice thereof. At the hearing any interested person may be heard in person or

by his representative. As soon as practicable after completion of the hearing, the Secretary shall by order make public his action in issuing, amending, or repealing the regulation or determining not to take such action. The Secretary shall base his order only on substantial evidence, of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. No such order shall take effect prior to the ninetieth day after it is issued, except that if the Secretary finds that emergency conditions exist necessitating an earlier effective date, then the Secretary shall specify in the order his findings as to such conditions and the order shall take effect at such earlier date as the Secretary shall specify therein to meet the emergency.

Review of order

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may at any time prior to the ninetieth day after such order is issued file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place of business, for a judicial review of such order. The summons and petition may be served at any place in the United States. The Secretary, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Secretary based his order.

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Secretary, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Secretary, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or perma-

nently. If the order of the Secretary refuses to issue, amend, or repeal a regulation and such order is not in accordance with law the court shall by its judgment order the Secretary to take action, with respect to such regulation, in accordance with law. The findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Secretary shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of Title 28, as amended.

(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

(6) The remedies provided for in this subsection shall be in addition to and not in substitution for any other remedies provided by law.

Copies of records of hearings

(g) A certified copy of the transcript of the record and proceedings under subsection (e) shall be furnished by the Secretary to any interested party at his request, and payment of the costs thereof, and shall be admissible in any criminal, libel for condemnation, exclusion of imports, or other proceeding arising under or in respect to this chapter, irrespective of whether proceedings with respect to the order have previously been instituted or become final under subsection (f). June 25, 1938, c. 675, § 701, 52 Stat. 1055.

Effective on enactment, by section 392 (a), post.

§ 372. Examinations and investigations

Authority to conduct

(a) The Secretary is authorized to conduct examinations and investigations for the purposes of this chapter through officers and employees of the Department or through any health, food, or drug office or employee of any State, Territory, or political subdivision thereof, duly commissioned by the Secretary as an officer of the Department. In the case of food packed in a Territory the Secretary shall attempt to make inspection of such food at the first point of entry within the United States when, in his opinion and with due regard to the enforcement of all the provisions of this chapter, the facilities at his disposal will permit of such inspection. For the

purposes of this subsection the term "United States" means the States and the District of Columbia.

Availability to owner of part of analysis samples

(b) Where a sample of a food, drug, or cosmetic is collected for analysis under this chapter the Secretary shall, upon request, provide a part of such official sample for examination or analysis by any person named on the label of the article, or the owner thereof, or his attorney or agent; except that the Secretary is authorized, by regulations, to make such reasonable exceptions from, and impose such reasonable terms and conditions relating to, the operation of this subsection as he finds necessary for the proper administration of the provisions of this chapter.

Records of other departments and agencies

(c) For purposes of enforcement of this chapter, records of any department or independent establishment in the executive branch of the Government shall be open to inspection by any official of the Department of Agriculture duly authorized by the Secretary to make such inspection. June 25, 1938, c. 675, § 702, 52 Stat. 1056.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 372a. Examination of sea food on request of packer; marking food with results; fees; penalties

The Secretary of Agriculture, upon application of any packer of any sea food for shipment or sale within the jurisdiction of this Act, may, at his discretion, designate inspectors to examine and inspect such food and the production, packing, and labeling thereof. If on such examination and inspection compliance is found with the provisions of this Act and regulations promulgated thereunder, the applicant shall be authorized or required to mark the food as provided by regulation to show such compliance. Services under this section shall be rendered only upon payment by the applicant of fees fixed by regulation in such amounts as may be necessary to provide, equip, and maintain an adequate and efficient inspection service. Receipts from such fees shall be covered into the Treasury and shall be available to the Secretary of Agriculture for expenditures incurred in carrying out the purposes of this section, including expenditures for salaries of additional inspectors when necessary to supplement the num-

ber of inspectors for whose salaries Congress has appropriated. The Secretary is hereby authorized to promulgate regulations governing the sanitary and other conditions under which the service herein provided shall be granted and maintained, and for otherwise carrying out the purposes of this section. Any person who forges, counterfeits, simulates, or falsely represents, or without proper authority uses any mark, stamp, tag, label, or other identification devices authorized or required by the provisions of this section or regulations thereunder, shall be guilty of a misdemeanor, and shall on conviction thereof be subject to imprisonment for not more than one year or a fine of not less than \$1,000 nor more than \$5,000, or both such imprisonment and fine. June 30, 1906, c. 3915, § 10A; June 22, 1934, c. 712, 48 Stat. 1204; Aug. 27, 1935, c. 739, 49 Stat. 871; June 25, 1938, c. 675, § 902 (a), 52 Stat. 1059.

This section, which is not a provision of the Federal Food, Drug, and Cosmetic Act, was formerly section 14a of this title. Act June 25, 1938, cited to the text, provided that the section should remain in force and effect and be applicable to the provisions of this chapter. See section 392(a), post.

§ 373. Records of interstate shipment

For the purpose of enforcing the provisions of this chapter, carriers engaged in interstate commerce, and persons receiving food, drugs, devices, or cosmetics in interstate commerce or holding such articles so received, shall, upon the request of an officer or employee duly designated by the Secretary, permit such officer or employee, at reasonable times, to have access to and to copy all records showing the movement in interstate commerce of any food, drug, device, or cosmetic, or the holding thereof during or after such movement, and the quantity, shipper, and consignee thereof; and it shall be unlawful for any such carrier or person to fail to permit such access to and copying of any such record so requested when such request is accompanied by a statement in writing specifying the nature or kind of food, drug, device, or cosmetic to which such request relates: *Provided*, That evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained: *Provided further*, That carriers shall not be subject to the other provisions of this chapter by reason of their receipt, carriage, holding, or delivery of food, drugs, devices, or cosmetics in the usual

course of business as carriers. June 25, 1938, c. 675, § 703, 52 Stat. 1057.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 374. Factory inspection

For purposes of enforcement of this chapter, officers or employees duly designated by the Secretary, after first making request and obtaining permission of the owner, operator, or custodian thereof, are authorized (1) to enter, at reasonable times, any factory, warehouse, or establishment in which food, drugs, devices, or cosmetics are manufactured, processed, packed, or held, for introduction into interstate commerce or are held after such introduction, or to enter any vehicle being used to transport or hold such food, drugs, devices, or cosmetics in interstate commerce; and (2) to inspect, at reasonable times, such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein. June 25, 1938, c. 675, § 704, 52 Stat. 1057.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 375. Publicity

Reports

(a) The Secretary shall cause to be published from time to time reports summarizing all judgments, decrees, and court orders which have been rendered under this chapter, including the nature of the charge and the disposition thereof.

Information regarding certain goods

(b) The Secretary may also cause to be disseminated information regarding food, drugs, devices, or cosmetics in situations involving, in the opinion of the Secretary, imminent danger to health or gross deception of the consumer. Nothing in this section shall be construed to prohibit the Secretary from collecting, reporting, and illustrating the results of the investigations of the Department. June 25, 1938, c. 675, § 705, 52 Stat. 1057.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 376. Cost of certification of coal tar colors

The admitting to listing and certification of coal-tar colors, in accordance with regulations prescribed under this chapter,

shall be performed only upon payment of such fees, which shall be specified in such regulations, as may be necessary to provide, maintain, and equip an adequate service for such purposes. June 25, 1938, c. 675, § 706, 52 Stat. 1058.

Effective twelve months after date of enactment, by section 392 (a), post.

SUBCHAPTER VIII—IMPORTS AND EXPORTS

§ 381. Imports and exports

Imports; examination and refusal of admission

(a) The Secretary of the Treasury shall deliver to the Secretary of Agriculture, upon his request, samples of food, drugs, devices, and cosmetics which are being imported or offered for import into the United States, giving notice thereof to the owner or consignee, who may appear before the Secretary of Agriculture and have the right to introduce testimony. If it appears from the examination of such samples or otherwise that (1) such article has been manufactured, processed, or packed under insanitary conditions, or (2) such article is forbidden or restricted in sale in the country in which it was produced or from which it was exported, or (3) such article is adulterated, misbranded, or in violation of section 355, then such article shall be refused admission. This paragraph shall not be construed to prohibit the admission of narcotic drugs the importation of which is permitted under section 2 of the Act of May 26, 1922, as amended (U.S.C., 1934 edition, title 21, sec. 173).¹

¹ So in original. Section 2 of cited Act comprises sections 180 and 182 of this title.

Same; disposition of refused articles

(b) The Secretary of the Treasury shall refuse delivery to the consignee and shall cause the destruction of any such article refused admission, unless such article is exported by the consignee within three months from the date of notice of such refusal, under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the Secretary of the Treasury may deliver to the consignee any such article pending examination and decision in the matter on execution of a bond as liquidated damages for the amount of the full invoice value thereof together with the duty thereon and on refusing for any cause to return such article or any part thereof to the custody of the Secretary of the Treasury when de-

manded for the purpose of excluding it from the country or for any other purpose, such consignee shall forfeit the full amount of the bond as liquidated damages.

Same; charges concerning refused articles

(c) All charges for storage, cartage, and labor on any article which is refused admission or delivery shall be paid by the owner or consignee and in default of such payment shall constitute a lien against any future importations made by such owner or consignee.

Exports

(d) A food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded under this chapter if it (1) accords to the specifications of the foreign purchaser, (2) is not in conflict with the laws of the country to which it is intended for export, and (3) is labeled on the outside of the shipping package to show that it is intended for export. But if such article is sold or offered for sale in domestic commerce, this subsection shall not exempt it from any of the provisions of this chapter. June 25, 1938, c. 675, § 801, 52 Stat. 1058.

Effective twelve months after date of enactment, by section 392 (a), post.

SUBCHAPTER IX—MISCELLANEOUS

§ 391. Separability clause

If any provision of this chapter is declared unconstitutional, or the applicability thereof to any person or circumstances is held invalid, the constitutionality of the remainder of the chapter and the applicability thereof to other persons and circumstances shall not be affected thereby. June 25, 1938, c. 675, § 901, 52 Stat. 1059.

Effective twelve months after date of enactment, by section 392 (a), post.

§ 392. Effective date and repeals

Effective date; repeal of 1906 Act; laws unaffected

(a) This chapter shall take effect twelve months after the date of its enactment. The Federal Food and Drugs Act of June 30, 1906, as amended,¹ shall remain in force until such effective date, and, except as otherwise provided in this subsection, is hereby repealed effective upon such date: *Provided*, That the provisions of section 371 shall become effective

on the enactment of this chapter, and thereafter the Secretary is authorized hereby to (1) conduct hearings and to promulgate regulations which shall become effective on or after the effective date of this chapter as the Secretary shall direct, and (2) designate prior to the effective date of this chapter food having common or usual names and exempt such food from the requirements of clause (2) of section 343 (i) for a reasonable time to permit the formulation, promulgation, and effective application of definitions and standards of identity therefor as provided by section 341: *Provided further*, That sections 352 (j), 355, and 361 (a), and all other provisions of this chapter to the extent that they may relate to the enforcement of such sections, shall take effect on the date of the enactment of this chapter, except that in the case of a cosmetic to which the proviso of section 361 (a) relates, such cosmetic shall not, prior to the ninetieth day after such date of enactment, be deemed adulterated by reason of the failure of its label to bear the legend prescribed in such proviso: *Provided further*, That section 321a of this title, defining butter and providing a standard therefor; section 321b of this title, defining wrapped meats as in package form; and section 372a of this title, shall remain in force and effect and be applicable to the provisions of this chapter.

Exemption of meats and meat food products

(b) Meats and meat food products shall be exempt from the provisions of this chapter to the extent of the application or the extension thereto of the Meat Inspection Act, approved March 4, 1907, as amended (U.S.C., 1934 ed., title 21, secs. 71-91; 34 Stat. 1260 et seq.).

Laws unaffected

(c) Nothing contained in this chapter shall be construed as in any way affecting, modifying, repealing, or superseding the provisions of the virus, serum, and toxin Act of July 1, 1902 (U.S.C., 1934 ed., title 42, chap. 4)²; the Filled Cheese Act of June 6, 1896 (U.S.C., 1934 ed., title 26, ch. 10)³, the Filled Milk Act of March 4, 1923 (U.S.C., 1934 ed., title 21, ch. 3, secs. 61-63); or the Import Milk Act of February 15, 1927 (U.S.C., 1934 ed., title 21, ch. 4, secs. 141-149).

Availability of appropriations

(d) In order to carry out the provisions of this chapter which take effect prior to the repeal of the Food and Drugs Act of June 30, 1906, as amended,¹ appropriations available

for the enforcement of such Act of June 30, 1906, are also authorized to be made available to carry out such provisions. June 25, 1938, c. 675, § 902, 52 Stat. 1059.

¹ See sections 1-5, 7-15, and 372a, ante.

² See section 141 et seq. of Title 42, The Public Health and Welfare.

³ See sections 1000 et seq., 1372, 1373, 1402(b), 1413, and 1691(a) (1) of Title 26, Internal Revenue.

WHEELER-LEA ACT

Section numbers refer to sections of U.S.C.A. Title 15, Commerce and Trade. Reprinted from United States Code Annotated, copyrighted 1939 by West Publishing Co., and Edward Thompson Company.

§ 52. Dissemination of false advertisements

Unlawfulness

(a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

Unfair or deceptive act or practice

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 45 of this title. Sept. 26, 1914, c. 311, § 12, as added March 21, 1938, c. 49, § 4, 52 Stat. 114.

§ 53. Same; temporary injunction

Power of Commission; jurisdiction of courts

(a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the

causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

Exception of periodical publications

(b) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement, the court shall exclude such issue from the operation of the restraining order or injunction. Sept. 26, 1914, c. 311, § 13, as added March 21, 1938, c. 49, § 4, 52 Stat. 114.

§ 54. Same; penalties

Imposition of penalties

(a) Any person, partnership, or corporation who violates any provision of section 52 (a) of this title shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the

advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than six months, or by both such fine and imprisonment; except that if the conviction is for a violation committed after a first conviction of such person, partnership, or corporation, for any violation of such section, punishment shall be by a fine of not more than \$10,000 or by imprisonment for not more than one year, or by both such fine and imprisonment: *Provided*, That for the purposes of this section meats and meat food products duly inspected, marked, and labeled in accordance with rules and regulations issued under the Meat Inspection Act approved March 4, 1907,¹ as amended, shall be conclusively presumed not injurious to health at the time the same leave official "establishments."

¹ See sections 71-93 and 95 of Title 21, Foods and Drugs.

Exception of advertising medium or agency

(b) No publisher, radio-broadcast licensee, or agency or medium for the dissemination of advertising, except the manufacturer, packer, distributor, or seller of the commodity to which the false advertisement relates, shall be liable under this section by reason of the dissemination by him of any false advertisement, unless he has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, seller, or advertising agency, residing in the United States, who caused him to disseminate such advertisement. No advertising agency shall be liable under this section by reason of the causing by it of the dissemination of any false advertisement, unless it has refused, on the request of the Commission, to furnish the Commission the name and post-office address of the manufacturer, packer, distributor, or seller, residing in the United States, who caused it to cause the dissemination of such advertisement. Sept. 26, 1914, c. 311, § 14, as added March 21, 1938, c. 49, § 4, 52 Stat. 114.

Act March 21, 1938, c. 49, § 5(b), 52 Stat. 117, provided as follows: "Section 14 of the Federal Trade Commission Act [this section] added to such Act by section 4 of this Act, shall take effect on the expiration of sixty days after the date of the enactment of this Act."

Offenses and penalties generally, see section 50 of this title.

§ 55. Additional definitions

For the purposes of sections 52, 53 and 54 of this title—

(a) False advertisement

The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

(b) Food

The term "food" means (1) articles used for food or drink for man or other animals, (2) chewing gum, and (3) articles used for components of any such article.

(c) Drug

The term "drug" means (1) articles recognized in the official United States Pharmacopœia, official Homœopathic Pharmacopœia of the United States, or official National Formulary, or any supplement to any of them; and (2) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; and (3) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (4) articles intended for use as a component of any article specified in clause (1), (2), or (3); but does not include devices or their components, parts, or accessories.

(d) Device

The term "device" (except when used in subsection (a) of this section) means instruments, apparatus, and contrivances, including their parts and accessories, intended (1) for use in

the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; or (2) to affect the structure or any function of the body of man or other animals.

(e) Cosmetic

The term "cosmetic" means (1) articles to be rubbed, poured, sprinkled, or sprayed on, introduced into, or otherwise applied to the human body or any part thereof intended for cleansing, beautifying, promoting attractiveness, or altering the appearance, and (2) articles intended for use as a component of any such article; except that such term shall not include soap. Sept. 26, 1914, c. 311, § 15, as added March 21, 1938, c. 49, § 4, 52 Stat. 114.

Other definitions, see sections 44 and 45(k) of this title.

§ 56. Proceedings to enforce penalty for violation of order

Whenever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (1) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection. Sept. 26, 1914, c. 311, § 16, as added March 21, 1938, c. 49, § 4, 52 Stat. 114.

§ 57. Separability clause

If any provision of this subdivision of this chapter, or the application thereof to any person, partnership, corporation, or circumstance, is held invalid, the remainder of the subdivision of this chapter, and the application of such provision to any other person, partnership, corporation, or circumstance, shall not be affected thereby. Sept. 26, 1914, c. 311, § 17, as added March 21, 1938, c. 49, § 4, 52 Stat. 114.

§ 58. Short title

This subdivision of this chapter may be cited as the "Federal Trade Commission Act". Sept. 26 1914, c. 311, § 18, as added March 21, 1938, c. 49, § 4, 52 Stat. 114.

APPENDIX 4

FEDERAL NARCOTIC FARM ACT

Section numbers refer to sections of U.S.C.A. Title 21, Food and Drugs. Reprinted from United States Code Annotated, Copyright 1939 by West Publishing Co. and Edward Thompson Company.

§ 221. Definitions of terms used in chapter. When used in this chapter—

(a) The term “habit-forming narcotic drug” or “narcotic” means opium and coca leaves and the innumerable alkaloids derived therefrom, the best known of these alkaloids being morphia, heroin, and codeine, obtained from opium, and cocaine derived from the coca plant; all compounds, salts, preparations, or other derivatives obtained either from the raw material or from the various alkaloids; Indian hemp and its various derivatives, compounds, and preparations, and peyote in its various forms.

(b) The term “addict” means any person who habitually uses any habit-forming narcotic drug as defined in this chapter so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self-control with reference to his addiction. (Jan. 19, 1929, c. 82, § 1, 45 Stat. 1085.)

§ 222. Narcotic farms for narcotic addicts; selection of sites. The Attorney General, the Secretary of the Treasury, and the Secretary of War are authorized and directed to select sites for two institutions for the confinement and treatment of persons who have been or shall be convicted of offenses against the United States, including persons convicted by general courts-martial and consular courts, and who are addicted to the use of habit-forming narcotic drugs, and for the confinement and treatment of addicts who voluntarily submit themselves for treatment. (Jan. 19, 1929, c. 82, § 2, 45 Stat. 1085.)

§ 223. Same; estimates of cost of sites and construction and maintenance of buildings; reports to Congress. Upon selection of appropriate sites the Secretary of the Treasury shall submit to Congress estimates of the cost of purchasing same, together with estimates of the expense necessary to construct the proper buildings thereon. The Secretary of the Treasury at the same time, and annually thereafter, shall submit estimates in detail for all expenses of maintaining the said United States narcotic farms, including salaries of all necessary officers and employees. (Jan. 19, 1929, c. 82, § 3, 45 Stat. 1085.)

§ 224. Same; plans for remodeling or construction of buildings. The Secretary of the Treasury is hereby authorized to cause the plans, drawings, designs, specifications, and estimates for the remodeling or construction of the necessary buildings to be prepared in the office of the Supervising Architect, Treasury Department, and the work of remodeling or constructing the said buildings to be supervised by the field force of said office: Provided, That the proper appropriations for the support and maintenance of the office of the Supervising Architect be reimbursed for the cost of preparing such plans, drawings, designs, specifications, and estimates for the aforesaid work and the supervision of the remodeling and construction of said buildings. (Jan. 19, 1929, c. 82, § 4, 45 Stat. 1086.)

§ 225. Same; control and management; Division of Mental Hygiene in Bureau of Public Health Service; creation; duties; rank, pay and allowances of medical officer in charge of Division. The control and management of the United States narcotic farms shall be vested in the Secretary of the Treasury, who shall have power to appoint competent superintendents, assistant superintendents, physicians, pharmacists, psychologists, nurses, and all other officers and employees necessary for the safe-keeping, care, protection, treatment, and discipline of the inmates. There is hereby created in the office of the Surgeon General of the Bureau of the Public Health Service, in the Department of the Treasury, a division to be known as the Division of Mental Hygiene, which shall be in charge of a physician trained in the treatment and care of narcotic addicts, and which division shall have charge of the management, discipline, and methods of treatment of said United States narcotic farms under the rules and regulations promulgated by the Secretary of the Treasury. The medical officer of the Public Health Service in charge of said division shall hold the rank and re-

ceive the pay and allowances of Assistant Surgeon General while so serving. (Jan. 19, 1929, c. 82, § 5, 45 Stat. 1086; June 14, 1930, c. 488, § 4 (a), 46 Stat. 586.)

This section as enacted by Act Jan. 19, 1929, cited thereto, created a "Narcotic Division." But by Act June 14, 1930, c. 488, § 4(a), also cited thereto, the name was changed to "Division of Mental Hygiene."

For effective date of Act June 14, 1930, cited to the text, see note to § 173a.

§ 226. Same; discipline and treatment of addicts; regulations; furnishing information to states. The care, discipline, and treatment of the persons admitted to or confined in a United States narcotic farm shall be designed to rehabilitate them, restore them to health, and where necessary train them to be self-supporting and self-reliant. For this purpose the Secretary of the Treasury shall have authority to promulgate all necessary rules and regulations for the government of the officers and inmates of said United States narcotic farms. The Surgeon General of the Bureau of the Public Health Service shall also give the authorized representatives of each State the benefit of his experience in the administration of said United States narcotic farms and the treatment of persons confined therein through the publication and dissemination of information on methods of treatment and research in this field, together with individual and group case histories, to the end that each State may be encouraged to provide similar facilities for the care and treatment of narcotic addicts within their own jurisdiction. (Jan. 19, 1929, c. 82, § 6, 45 Stat. 1086.)

§ 227. Same; transfer of addicts who are prisoners to and from farms. The authority vested with the power to designate the place of confinement of a prisoner is hereby authorized and directed to transfer to the United States narcotic farms, as accommodations become available, all addicts, as herein defined, who are now or shall hereafter be sentenced to confinement in or be confined in any penal, correctional, disciplinary, or reformatory institution of the United States, including those addicts convicted of offenses against the United States who are confined in State and Territorial prisons, penitentiaries, and reformatories: Provided, That no addict shall be transferred to a United States narcotic farm, who, in the opinion of the officer authorized to direct the transfer, is not a proper subject for confinement in such an institution either because of the nature of the crime he has committed, or his apparent incorrigibility. The authority vested with the power to designate the place of con-

finement of a prisoner is authorized to transfer from a United States narcotic farm to the institution from which he was received, or to such other institution as may be designated by the proper authority, any addict whose presence at a United States narcotic farm is detrimental to the well-being of the institution, or who does not continue to be a narcotic addict under the terms of this chapter. All transfers to or from a narcotic farm shall be made by the officer in charge of such farm, and the actual and necessary expenses incident to such transfers shall be paid from the appropriation for the maintenance of such farm. (Jan. 19, 1929, c. 82, § 7, 45 Stat. 1086.)

§ 228. Same; duty of prosecuting officers to report convicted persons believed to be addicts. It shall be the duty of each prosecuting officer, when sentence is pronounced, to report to the authority vested with the power to designate the place of confinement the name of each convicted person believed by him to be an addict, as herein defined, his reasons for such belief, and all pertinent facts bearing on such addiction, together with the nature of the offense. (Jan. 19, 1929, c. 82, § 8, 45 Stat. 1087.)

§ 229. Same; employment of inmates; establishment of shops; disposition of manufactured articles; report to Congress. The inmates of said narcotic farms shall be employed in such manner and under such conditions as the Secretary of the Treasury may direct. The Secretary of the Treasury may, in his discretion, establish industries, plants, factories, or shops for the manufacture of articles, commodities, and supplies for the United States Government; require any Government department or establishment or other institution appropriated for directly or indirectly by the Congress of the United States to purchase at current market prices as determined by the Secretary of the Treasury, or his authorized representative, such articles, commodities, or supplies as meet their specifications; and the Secretary of the Treasury shall provide for the payment to the inmates or their dependents such pecuniary earnings as he may deem proper, and establish a working-capital fund for said industries out of any funds appropriated for said narcotic farms; and said working-capital fund shall be available for the purchase, repair, or replacement of machinery or equipment, for the purchase of raw materials and supplies, and for the employment of necessary civilian officers and employees: Provided, That at the opening of each regular session of Congress the Sec-

retary of the Treasury shall make a detailed report to Congress of the receipts and expenditures made from said working-capital fund. (Jan. 19, 1929, c. 82, § 9, 45 Stat. 1087.)

§ 230. Same; parole of inmates; commutation allowances for good conduct. Any inmate of said narcotic farms or any narcotic addict confined in any institution convicted of an offense against the United States shall not be eligible for parole under sections 714 to 721 of Title 18 or under the provisions of any Act or regulation relating to parole, or receive any commutation allowance for good conduct in accordance with the provisions of sections 710 to 712a of Title 18, unless and until the Surgeon General of the Bureau of the Public Health Service shall have certified that said inmate is no longer a narcotic addict as defined by this chapter. When such certificate shall have been made, the board of parole of the penal, correctional, disciplinary, or reformatory institution from which such former addict was transferred may authorize his release on parole without transfer back to such institution. (Jan. 19, 1929, c. 82, § 10, 45 Stat. 1087.)

§ 231. Same; discharge of addicts; further treatment; addicts voluntarily submitting themselves to treatment. Not later than one month prior to the expiration of the sentence of any addict confined in a United States narcotic farm, he shall be examined by the Surgeon General of the Bureau of the Public Health Service, or his authorized representative. If he believes the person to be discharged is still an addict within the meaning of this chapter and that he may by further treatment in a United States narcotic farm be cured of his addiction, the addict shall be informed, under such rules and regulations as the Secretary of the Treasury may promulgate, of the advisability of his submitting himself to further treatment. The addict may then apply in writing to the Secretary of the Treasury for further treatment in a United States narcotic farm for a period not exceeding the maximum length of time considered necessary by the Surgeon General of the Bureau of the Public Health Service. Upon approval of the application by the Secretary of the Treasury or his authorized agent, the addict may be given such further treatment as is necessary to cure him of his addiction: Provided, That if any addict voluntarily submits himself to treatment he may be confined in a United States narcotic farm for a period not exceeding the maximum amount of time estimated by the Surgeon General of the Bureau of the Public

Health Service as necessary to effect a cure or until he ceases to be an addict within the meaning of this chapter. (Jan. 19, 1929, c. 82, § 11, 45 Stat. 1087.)

§ 232. Same; admission of addicts who are not prisoners. Any person, except an unconvicted alien, addicted to the use of habit-forming narcotic drugs, whether or not he shall have been convicted of an offense against the United States, may apply to the Secretary of the Treasury, or his authorized representative, for admission to a United States narcotic farm.

Any such addict shall be examined by the Surgeon General of the Bureau of the Public Health Service or his authorized agent, who shall report to the Secretary of the Treasury whether the applicant is an addict within the meaning of this chapter; whether he believes he may by treatment in a United States narcotic farm be cured of his addiction and the estimated length of time necessary to effect a cure, and any further pertinent information bearing on the addiction, habits, or character of the applicant. The Secretary of the Treasury may, in his discretion, admit the applicant to a United States narcotic farm. No such addict shall be admitted unless he voluntarily submits to treatment for the maximum amount of time estimated by the Surgeon General of the Bureau of the Public Health Service as necessary to effect a cure, and unless suitable accommodations are available after all eligible addicts convicted of offenses against the United States have been admitted. The Secretary of the Treasury may require any such addict voluntarily applying to pay the cost of his subsistence, care, and treatment. All such money shall be covered into the Treasury of the United States to the credit of the appropriation from which the expenditure was made: Provided, That if any addict voluntarily submits himself to treatment he may be confined in a United States narcotic farm for a period not exceeding the maximum amount of time estimated by the Surgeon General of the Bureau of the Public Health Service as necessary to effect a cure of the addiction or until he ceases to be an addict within the meaning of this chapter: And provided further, That any person who voluntarily submits himself for treatment at a United States narcotic farm shall not forfeit or abridge thereby any of his rights as a citizen of the United States; nor shall such submission be used against him in any proceeding in any court, and that the record of his voluntary commitment shall be confidential and not divulged. (Jan. 19, 1929, c. 82, § 12, 45 Stat. 1088.)

§ 233. Same; discharged addicts; gratuities and transportation; admission of probationers to farms. Every person convicted of an offense against the United States shall upon discharge, or upon his release on parole, from a United States narcotic farm be furnished with the gratuities and transportation authorized by law to be furnished had his discharge or release been from the penal, correctional, disciplinary, or reformatory institution to which he was sentenced or from which he was transferred.

Any court of the United States having the power to suspend the imposition or execution of sentence, and place defendants on probation under any of the existing laws, may impose as one of the conditions of such probation that the defendant, if an addict, as herein defined, shall be admitted and submit himself for treatment at a United States narcotic farm until discharged therefrom as cured. Upon the discharge of any such probationer from a United States narcotic farm, he shall be furnished with the gratuities and transportation authorized to be furnished by section 746 of Title 18. The actual and necessary expense incident to transporting such probationer to such farm and to furnishing such transportation and gratuities, shall be paid from the appropriation for the maintenance of such farm: Provided, That where existing law vests a discretion in any officer as to the place to which transportation shall be furnished or as to the amount of clothing and gratuities to be furnished, such discretion shall be exercised by the Secretary of the Treasury with respect to addicts discharged from United States narcotic farms. (Jan. 19, 1929, c. 82, § 13, 45 Stat. 1088.)

§ 234. Same; prohibiting introduction of narcotic drugs on premises. Any person not authorized by law or by the Secretary of the Treasury who introduces or attempts to introduce into a United States narcotic farm or within the grounds adjoining or adjacent thereto any habit-forming narcotic drugs as defined in this chapter is guilty of a felony, and is punishable by confinement in the penitentiary for a period of not more than ten years. (Jan. 19, 1929, c. 82, § 14, 45 Stat. 1089.)

§ 235. Same; escape of inmates. It shall be unlawful for any person properly committed thereto to escape or attempt to escape from a narcotic farm, and any such person upon apprehension and conviction in a United States court shall be punished by imprisonment for not more than five years, such sentence

to begin upon the expiration of the sentence for which said person was originally confined. (Jan. 19, 1929, c. 82, § 15, 45 Stat. 1089.)

§ 236. Same; procuring escape of inmates; concealment of escaped inmates. It shall be unlawful for any person to procure the escape of any inmate properly committed to a narcotic farm or to advise, connive at, aid, or assist in such escape, or conceal any such inmate after such escape, and upon conviction in a United States court shall be punished by imprisonment in the penitentiary for not more than three years. (Jan. 19, 1929, c. 82, § 16, 45 Stat. 1089.)

§ 237. Same; alien inmates; deportation. Wherever an alien addict has been transferred to either of the United States narcotic farms provided for in this chapter who is entitled to his discharge but is subject to deportation in lieu of being returned to the penal institution from which he came, he shall be deported by the authority vested by law with power over deportation. (Jan. 19, 1929, c. 82, § 17, 45 Stat. 1089.)

APPENDIX 5

FEDERAL CAUSTIC POISON ACT

Section numbers refer to sections of U.S.C.A. Title 15, Commerce and Trade. Reprinted from United States Code Annotated, Copyright 1938 by West Publishing Co. and Edward Thompson Company.

§ 401. Citation. This chapter may be cited as the Federal Caustic Poison Act. (Mar. 4, 1927, c. 489, § 1, 44 Stat. 1406.)

Time of taking effect.—Section 11 of the Act constituting this chapter provided as follows: "This Act shall take effect upon its passage; but no penalty or condemnation shall be enforced for any violation of the Act occurring within six months after its passage."

§ 402. Definitions. As used in this chapter, unless the context otherwise requires—

(a) The term "dangerous caustic or corrosive substance" means:

(1) Hydrochloric acid and any preparation containing free or chemically unneutralized hydrochloric acid (HCl) in a concentration of 10 per centum or more;

(2) Sulphuric acid and any preparation containing free or chemically unneutralized sulphuric acid (H_2SO_4) in a concentration of 10 per centum or more;

(3) Nitric acid or any preparation containing free or chemically unneutralized nitric acid (HNO_3) in a concentration of 5 per centum or more;

(4) Carboic acid ($\text{C}_6\text{H}_5\text{OH}$), otherwise known as phenol, and any preparation containing carboic acid in a concentration of 5 per centum or more;

(5) Oxalic acid and any preparation containing free or chemically unneutralized oxalic acid ($\text{H}_2\text{C}_2\text{O}_4$) in a concentration of 10 per centum or more;

(6) Any salt of oxalic acid and any preparation containing any such salt in a concentration of 10 per centum or more;

(7) Acetic acid or any preparation containing free or chemically unneutralized acetic acid ($\text{HC}_2\text{H}_3\text{O}_2$) in a concentration of 20 per centum or more;

(8) Hypochlorous acid, either free or combined, and any preparation containing the same in a concentration so as to yield 10 per centum or more by weight of available chlorine, excluding calx chlorinata, bleaching powder, and chloride of lime;

(9) Potassium hydroxide and any preparation containing free or chemically unneutralized potassium hydroxide (KOH), including caustic potash and Vienna paste, in a concentration of 10 per centum or more;

(10) Sodium hydroxide and any preparation containing free or chemically unneutralized sodium hydroxide (NaOH), including caustic soda and lye, in a concentration of 10 per centum or more;

(11) Silver nitrate, sometimes known as lunar caustic, and any preparation containing silver nitrate (AgNO_3) in a concentration of 5 per centum or more; and

(12) Ammonia water and any preparation containing free or chemically uncombined ammonia (NH_3), including ammonium hydroxide and "hartshorn," in a concentration of 5 per centum or more.

(b) The term "misbranded parcel, package, or container" means a retail parcel, package, or container of any dangerous caustic or corrosive substance not bearing a conspicuous, easily legible label or sticker, containing—

(1) The common name of the substance;

(2) The name and place of business of the manufacturer, packer, seller, or distributor;

(3) The word "poison," running parallel with the main body of reading matter on the label or sticker, on a clear, plain background of a distinctly contrasting color, in uncondensed gothic capital letters, the letters to be not less than twenty-four point size unless there is on the label or sticker no other type so large, in which event the type shall be not smaller than the largest type on the label or sticker; and

(4) Directions for treatment in case of accidental personal injury by any dangerous caustic or corrosive substance, except that such directions need not appear on labels or stickers, on parcels, packages or containers at the time of shipment or of delivery for shipment by manufacturers and wholesalers for other than household use.

(c) The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District

of Columbia, but through any place outside thereof, or within any Territory or possession, or the District of Columbia.

(d) This chapter is not to be construed as modifying or limiting in any way the right of any person to manufacture, pack, ship, sell, barter, and distribute dangerous caustic or corrosive substances in parcels, packages, or containers, labeled as required by this chapter. (Mar. 4, 1927, c. 489, § 2, 44 Stat. 1406.)

§ 403. Prohibition against misbranded shipments. No person shall ship or deliver for shipment in interstate or foreign commerce or receive from shipment in such commerce any dangerous caustic or corrosive substance for sale or exchange, or sell or offer for sale any such substance in any Territory or possession or in the District of Columbia, in a misbranded parcel, package, or container suitable for household use; except that the preceding provisions of this section shall not apply—

(a) To any regularly established common carrier shipping or delivering for shipment, or receiving from shipment, any such substance in the ordinary course of its business as a common carrier; nor

(b) To any person in respect of any such substance shipped or delivered for shipment, or received from shipment, for export to any foreign country, in a parcel, package, or container branded in accordance with the specifications of a foreign purchaser and in accordance with the laws of the foreign country.

(c) To any dealer when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in the United States, from whom he purchases such articles, to the effect that the article is not misbranded within the meaning of this chapter. This guaranty, to afford protection, shall contain the name and address of the party or parties making the sale of such article to such dealer, and in such case said party or parties shall be amenable to the prosecutions, fines, and other penalties which would attach, in due course, to the dealer under the provisions of this chapter. (Mar. 4, 1927, c. 489, § 3, 44 Stat. 1407.)

§ 404. Libel for condemnation proceedings. (a) Any dangerous caustic or corrosive substance in a misbranded parcel, package, or container suitable for household use shall be liable to be proceeded against in the district court of the United States for any judicial district in which the substance is found and to be seized for confiscation by a process of libel for condemnation, if such substance is being—

- (1) Shipped in interstate or foreign commerce, or
 - (2) Held for sale or exchange after having been so shipped,
- or

(3) Held for sale or exchange in any Territory or possession or in the District of Columbia.

(b) If such substance is condemned as misbranded by the court it shall be disposed of in the discretion of the court—

(1) By destruction.

(2) By sale. The proceeds of the sale, less legal costs and charges, shall be paid into the Treasury as miscellaneous receipts. Such substance shall not be sold in any jurisdiction contrary to the provisions of this chapter or the laws of such jurisdiction, and the court may require the purchaser at any such sale to label such substance in compliance with law before the delivery thereof.

(3) By delivery to the owner thereof upon the payment of legal costs and charges and execution and delivery of a good and sufficient bond to the effect that such substance will not be sold or otherwise disposed of in any jurisdiction contrary to the provisions of this chapter or the laws of such jurisdiction.

(c) Proceedings in such libel cases shall conform, as nearly as may be, to suits in rem in admiralty, except that either party may demand trial by jury on any issue of fact if the value in controversy exceeds \$20. In case of a jury trial the verdict of the jury shall have the same effect as a finding of the court upon the facts. All such proceedings shall be at the suit and in the name of the United States. (Mar. 4, 1927, c. 489, § 4, 44 Stat. 1408.)

§ 405. Exclusion of misbranded imports. (a) Whenever in the case of any dangerous caustic or corrosive substance being offered for importation the Secretary of Agriculture has reason to believe that such substance is being shipped in interstate or foreign commerce in violation of section 403 of this title, he shall give due notice and opportunity for hearing thereon to the owner or consignee and certify such fact to the Secretary of the Treasury, who shall thereupon (1) refuse admission and delivery to the consignee of such substance, or (2) deliver such substance to the consignee pending examination, hearing, and decision in the matter, on the execution of a penal bond to the amount of the full invoice value of such substance, together with the duty thereon, if any, and to the effect that on refusal to return such substance for any cause to the Secretary of the Treasury when demanded, for the purpose of excluding it from the

country or for any other purpose, the consignee shall forfeit the full amount of the bond.

(b) If, after proceeding in accordance with subdivision (a), the Secretary of Agriculture is satisfied that such substance being offered for importation was shipped in interstate or foreign commerce in violation of any provision of this chapter, he shall certify the fact to the Secretary of the Treasury, who shall thereupon notify the owner or consignee and cause the sale or other disposition of such substance refused admission and delivery or entered under bond, unless it is exported by the owner or consignee or labeled by him so as to conform to the law within three months from the date of such notice, under such regulations as the Secretary of the Treasury may prescribe. All charges for storage, cartage, or labor on any such substance refused admission or delivery or entered upon bond shall be paid by the owner or consignee. In default of such payment such charges shall constitute a lien against any future importations made by such owner or consignee. (Mar. 4, 1927, c. 489, § 5, 44 Stat. 1408.)

§ 406. Removal of labels. No person shall alter, mutilate, destroy, obliterate, or remove any label or sticker required by this chapter to be placed on any dangerous caustic or corrosive substance, if such substance is being—

(a) Shipped in interstate or foreign commerce; or

(b) Held for sale or exchange after having been so shipped;
or

(c) Held for sale or exchange in any Territory or possession or by the District of Columbia. (Mar. 4, 1927, c. 489, § 6, 44 Stat. 1409.)

§ 407. Penalties. Any person violating any provision of section 403 or 406 of this title shall upon conviction thereof be punished by a fine of not more than \$200 or imprisonment for not more than ninety days, or by both. (Mar. 4, 1927, c. 489, § 7, 44 Stat. 1409.)

§ 408. Institution of libel for condemnation and criminal proceedings. It shall be the duty of each United States district attorney to whom the Secretary of Agriculture shall report any violation of section 403 or 406 of this title or to whom any health, medical, or drug officer or agent of any State, Territory, or possession, or of the District of Columbia presents satisfactory evidence of any such violation, to cause libel for condemnation and criminal proceedings under sections 404 and 407 of this

title to be commenced and prosecuted in the proper courts of the United States, without delay, for the enforcement of the condemnation and penalties provided in such sections. (Mar. 4, 1927, c. 489, § 8, 44 Stat. 1409.)

§ 409. Enforcement of chapter. (a) Except as otherwise specifically provided in this chapter, the Secretary of Agriculture shall enforce its provisions.

(b) For enforcing the provisions of sections 404, 405, and 407 of this title, the Secretary of Agriculture may cause investigations, inspections, analyses, and tests to be made and samples to be collected, of any dangerous caustic or corrosive substance. The Department of Agriculture shall pay to the person entitled, upon his request, the reasonable market value of any such sample taken. If it appears from the inspection, analysis, or test of any dangerous caustic or corrosive substance that such substance is in a misbranded package, parcel, or container suitable for household use, the Secretary of Agriculture shall cause notice thereof to be given to any person who may be liable for any violation of section 403 or 406 of this title in respect of such substance. Any person so notified shall be given an opportunity to be heard under regulations prescribed by the Secretary of Agriculture. If it appears that such person has violated the provisions of section 403 or 406 of this title the Secretary of Agriculture shall at once certify the facts to the proper United States district attorney, with a copy of the results of the inspection, analysis, or test duly authenticated under oath by the person making such inspection, analysis, or test.

(c) For the enforcement of his functions under this chapter the Secretary of Agriculture is authorized—

(1) To prescribe and promulgate such regulations as may be necessary.

(2) To cooperate with any department or agency of the Government, with any State, Territory, or possession, or with the District of Columbia, or with any department, agency, or political subdivision thereof, or with any person.

(3) Subject to the civil service laws to appoint and, in accordance with chapter 13 of Title 5, to fix the salaries of such officers and employees as may be required for the execution of the functions of the Secretary of Agriculture under this chapter and as may be provided for by the Congress from time to time.

(4) To make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, and for law books, books of reference, and periodicals) as

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may be required for the execution of the functions vested in the Secretary of Agriculture by this chapter and as may be provided for by the Congress from time to time.

(5) To give notice, by publication in such manner as the Secretary of Agriculture may by regulation prescribe, of the judgment of the court in any case under the provisions of this chapter. (Mar. 4, 1927, c. 489, § 9, 44 Stat. 1409.)

§ 410. Separability clause. If any provision of this chapter is declared unconstitutional, or the applicability thereof to any person or circumstance is held invalid, the constitutionality of the remainder of the chapter and the applicability thereof to other persons and circumstances shall not be affected thereby. (Mar. 4, 1927, c. 489, § 10, 44 Stat. 1410.)

§ 411. Application to existing law. The provisions of this chapter shall be held to be in addition to and not in substitution for the provisions of the following acts:

(a) The Food and Drugs Act, approved June 30, 1906, as amended [sections 1 to 15 of Title 21].

(b) The Insecticide Act of 1910, as amended [chapter 6 of Title 7].

(c) The Act entitled "An Act to regulate the practice of pharmacy and the sale of poisons in the District of Columbia, and for other purposes," approved May 7, 1906, as amended. (Mar. 4, 1927, c. 489, § 12, 44 Stat. 1410.)

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